

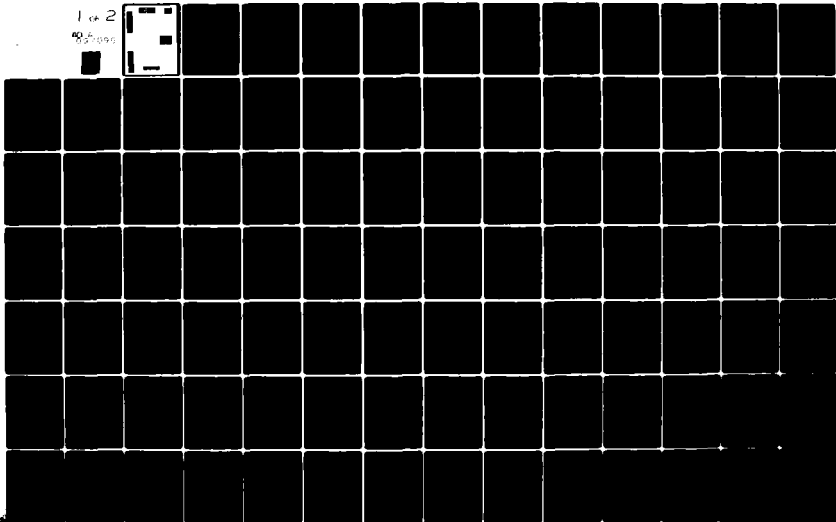
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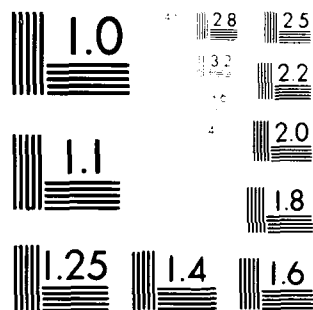
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evaluation of the changes that can be attributed to the CDA. Eleven precedent-setting cases of the Corps of Engineers Board of Contract Appeals and Armed Services Board of Contract Appeals are also discussed. Data were gathered through a questionnaire distributed to the Corps' personnel, and their views are contrasted with those of contractors as provided by current legal periodicals. Conclusions are presented as to the effect of the Act on Corps' construction contracts along with recommendations for future research in this area.

AN ASSESSMENT OF THE IMPACT OF THE CONTRACT
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OF ENGINEERS' CONSTRUCTION CONTRACTS

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The Graduate School

Department of Civil Engineering

An Assessment of the Impact of the Contract
Disputes Act of 1978 on U. S. Army Corps
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A Thesis in

Civil Engineering

by

Glenn J. Petrina

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Master of Science

March, 1981



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ABSTRACT

This thesis is an assessment of the impact of the Contract Disputes Act of 1978 on construction contracts of the U. S. Army Corps of Engineers. Research of the disputes resolution system used prior to the Contract Disputes Act (CDA) is combined with the portions of the Contract Disputes Act that directly affect the Corps' construction contracts and the changes to the Defense Acquisition Regulations that implement the CDA to provide an evaluation of the changes that can be attributed to the CDA. Eleven precedent-setting cases of the Corps of Engineers Board of Contract Appeals and Armed Services Board of Contract Appeals are also discussed. Data were gathered through a questionnaire distributed to the Corps' personnel, and their views are contrasted with those of contractors as provided by current legal periodicals. Conclusions are presented as to the effect of the Act on Corps' construction contracts along with recommendations for future research in this area.

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CHAPTER I

INTRODUCTION

Prelude

On November 1, 1978, Public Law 95-563 was passed. The common name of this law is the "Contract Disputes Act of 1978." It provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies to resolve Government contract claims. The purpose of the Act is to reduce litigation by providing several alternative means of resolving disputes. The Act attempts to insure that the contractor and the Federal Government have equal bargaining power and that each receives fair and equitable treatment under the law.

Prior to the passage of the Contract Disputes Act, contractors could only resolve their disputes through negotiations with a Government Contracting Officer. If negotiations failed, the Contracting Officer would issue a final decision on the dispute and contractually the contractor was required to comply with that decision. The contractor could, if dissatisfied with that result, appeal the Contracting Officer's decision to a Board of Contract Appeals. The Board which was appointed by the Government agency would hear the case and issue their decision on the claim. Their decision was essentially final unless fraudulent conduct could be proven. Only breach of contract claims were allowed direct access to the courts by

the Government's adhesion-type contracts. The contractors were given little or no choice; they could accept the contract with the limited access to the courts as stipulated in the disputes clause or they could elect not to bid on Government contracts.

For these reasons, the Board of Contract Appeals was often the contractor's only opportunity for a hearing. Over the years contractors had, therefore, pressed for the adoption of many legal procedures at the board level that were previously only associated with the court system and the due process of the law. The Board of Contract Appeals process that had been designed to provide a speedy economical administrative remedy had now been slowed and complicated with additional judicial proceedings. This evolution of the Board system caused it to have the worst qualities of both systems, providing neither the full due process of the law for large monetary claims nor the speedy decision capabilities on lesser claims. The Contract Disputes Act was passed to alleviate these and other problems in the system.

Thesis Objective

The primary objective of this thesis is to assess the changes in the disputes resolution procedure, if any, which can be attributed to the passage of the Contract Disputes Act and to evaluate the impact of the implementation of the Act on construction contracts of the U. S. Army Corps of Engineers. The data collected will be qualitative, attempting to determine the experience and perception of those working

with the Act. Additionally, there will be a review of the history of federal contracting prior to the Contract Disputes Act highlighting significant events that necessitated the passage of this Act. A discussion of the procedures for resolving contract disputes prior to the Act will be contrasted with the new procedures implemented with the Act. An in-depth review of the various sections of the Act accompanied with a review of the implementing regulations published by the Office of Federal Procurement Policy will also be included.

Another objective of this thesis is to review the early precedent-setting decisions of the Boards of Contract Appeals. As in all legislation, the final interpretation of viewed differences in the law must be done by the judicial system. In contract disputes with executive agencies such as the Corps of Engineers, the appropriate Board of Contract Appeals is the arbitrator of fact most often chosen by dissatisfied contractors. Direct access or appeal from a Board of Contract Appeals (BCA) decision to the Court of Claims are other less frequently used methods of resolution. Because of the brief period of time since the passage of the Contract Disputes Act (CDA), there have been no decisions rendered by the courts and therefore only decisions of the Board of Contract Appeals will be analyzed in this thesis.

Methodology

The initial step in the research effort involved a review of information available in the legal section of Pattee Library, The Pennsylvania State University, University Park, Pennsylvania. The

Contract Disputes Act was located in both the Statutes at Large, listed as Public Law 95-563 and in the United States Code, Section 41 USCA 601. Pattee, being a Federal Depository, also had a number of Government publications which provided additional history and background leading to the passage of the Act.

The Office of the Chief of Engineers (OCE) for the Corps, located in Washington, D.C., was the major source of specific information for this thesis. During four trips to Washington, information such as Board of Contract Appeal cases and legal interpretations of the CDA published in law journals and periodicals were obtained. The majority of the interviews for this thesis was also conducted during these trips to Washington, D.C. To supplement the information, previous military associates that are now working in District Offices of the Corps as Contracting Officers were contacted to obtain their perceptions of the Act. In addition to providing literature on the Act, one military officer also provided contacts with construction firms and allowed the use of his name as a means of introduction to the firms.

The next step involved contacting, by means of a questionnaire, the 48 Divisions and District Offices of the Corps and 40 civilian contractors in order to obtain their perceptions and experiences related to contract disputes. Assistance from the Counsel for the OCE and from the U. S. Army Judge Advocate General's School was obtained in the preparation of the questionnaire. Follow-up interviews and correspondence with Contracting Officers and legal counsel for the Corps represented the last data gathering step for this thesis. An outline of how this information will be presented is given below.

Thesis Organization

The first chapter introduces the Contract Disputes Act and some of the changes in the disputes resolution process implemented by this law. The objectives of the thesis and the methodology for accomplishing them are also presented.

Chapter II introduces the Corps of Engineers' construction management system, including the functions of the Contracting Officer and his interface with the Board of Contract Appeals and the court system. The history of events leading to the passage of the CDA is also discussed.

In the third chapter the Contract Disputes Act is discussed in detail. The implementing regulations of the Act which include the disputes clause used in executive agency contracts, the rules of the Board of Contract Appeals, and the contents of an appeal file are also discussed.

Chapter IV presents some legal interpretations on portions of the CDA. Eleven case decisions of the Armed Services Board of Contract Appeals and the Engineer's Board of Contract Appeals are discussed.

In Chapter V the perceptions of the legal community that works with the CDA are presented. This includes results of a questionnaire of the Corps and information gathered from current legal periodicals which discuss the opinions of contractors and their legal counsel.

The last chapter presents a final summary of the findings of this thesis, the conclusions reached by the writer regarding the Contract Disputes Act, and an evaluation of its impact on the

contracting work done by the Corps. Additional areas for further research in this field are also included.

CHAPTER II

THE DISPUTES RESOLUTION SYSTEM PRIOR TO THE CONTRACT DISPUTES ACT

Introduction

All Government contracts are adhesion-type contracts. The contractor can usually negotiate the price and in some instances the time for completion but the remainder of the contract is not negotiable. Historically, Government personnel have unilaterally drafted contract provisions as part of the issuance of procurement regulations. These contract provisions have an unusual finality requirement in their method of settling contract disputes. The contract dispute clauses state that claims under the provisions of the contract must be decided by the Contracting Officer whose decision is final. The only alternative the contractor has is an appeal of the Contracting Officer's decision to a Board of Contract Appeals appointed by that Government agency. The contractor who enters such a contract does so voluntarily and therefore consents to the disputes clause and also to this method of resolving disputes.

This disputes resolution system, which was used by the Corps and other Government agencies prior to the CDA, is discussed in this chapter. The Corps construction organization is also outlined. The court system and several Supreme Court decisions that interpreted the finality of the disputes clauses is also reviewed. The Government report that led to the formulation of the CDA and a brief

Congressional history of the CDA is presented in the last two sections of this chapter.

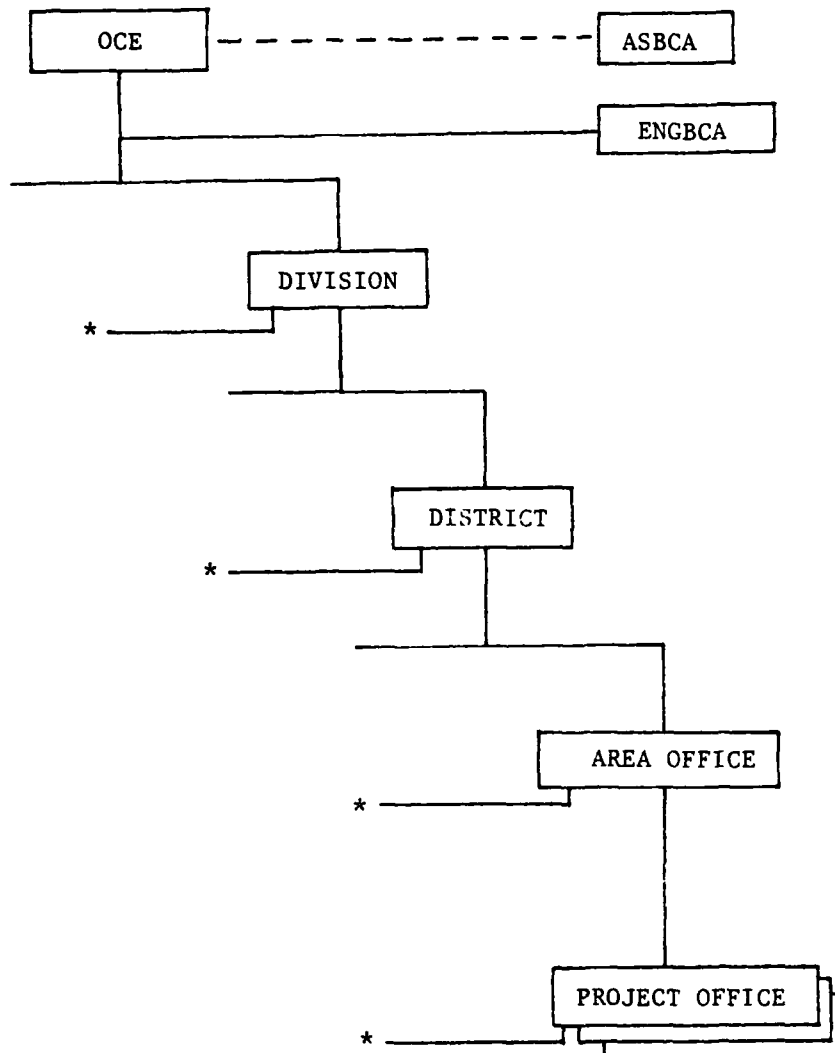
The Corps Organization and Disputes Resolution System

Organization

The disputes resolution system of Corps of Engineer contracts operates at three levels: (1) the Contracting Officer level, (2) the administrative or Board of Contract Appeals level, and (3) the Judicial level. In the Corps of Engineer's Construction Organization, shown in Figure 2.1, the duties of the Contracting Officer, depending on the organization of the Division itself and the scope of the construction project, are assigned to personnel at all levels from the Division Office down to the Area Office. The Contracting Officer is the Government's authorized representative for the contract and renders decisions for the Government on all questions concerning the contract.

The Office of the Chief of Engineers (OCE) heads the organization and has the ultimate responsibility for managing the Corps' construction program. The Engineer Board of Contract Appeals (ENGBCA) functions on the OCE staff level and is co-located in the same building with the OCE in Washington, D.C. The Armed Services Board of Contract Appeals (ASBCA), although not a part of the Corps' organization, is a part of the Corps' appeal system.

The Corps has two programs of construction. The Military Construction Army (MCA) is the largest and includes all military facilities and associated construction. The Civil Works Program



* Contracting Officer could be located at this level.

Figure 2.1. Corps Construction Organization.

includes the civilian construction of the Corps, mostly in the area of flood control and river navigation. The ASBCA handles all appeals of the MCA program while the ENGBCA handles all appeals of the Civil Works Program.

The first operational level of the Corps is the Division. There are fourteen Divisions world wide and each one is further subdivided into Districts. Geographic and workload considerations govern the number of Districts in a Division (varying from none to as many as six). The number of supervisory positions, as required by the type and amount of construction being conducted, will dictate the need for area and project offices. A Division without a subordinate District would necessarily have the Contracting Officer located at the Division level. A small construction project in a Division, with levels down to and including an area office as shown in Figure 2.1, may have a Contracting Officer located in the area office. The rank or grade of the Contracting Officer is normally commensurate with the cost and complexity of the construction. The duties of the Contracting Officer are often assigned to the level of the organization that has an officer of the proper grade to administer the contract.

Dispute Resolution System

A model of the old dispute resolution system is shown in Figure 2.2. The various elements of the model are discussed in detail in the sections which follow.

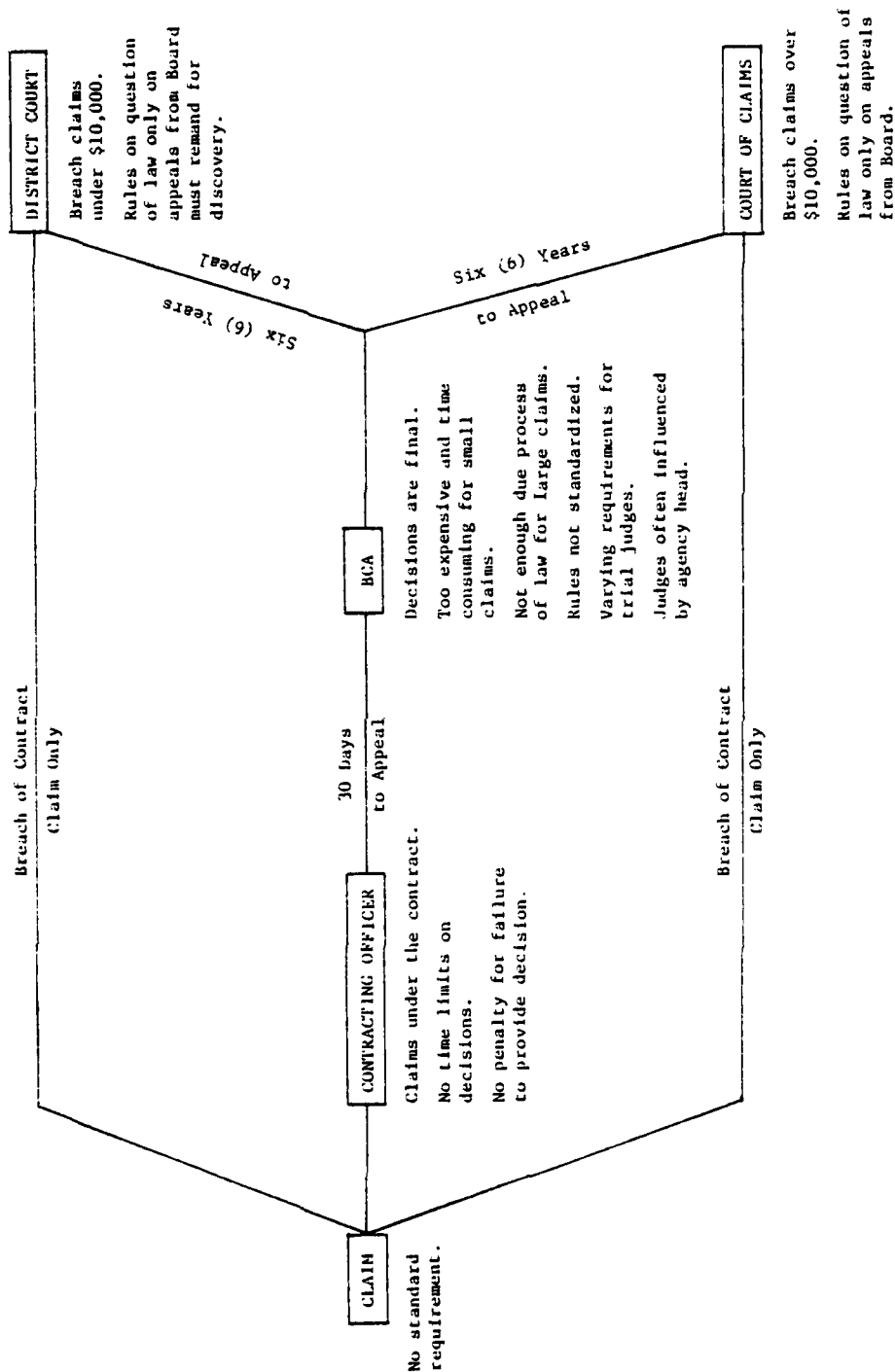


Figure 2.2. Dispute Resolution Process Prior to Contract Disputes Act.

Contracting Officer Level

The Contracting Officer represents the Government's interest and administers the day-to-day performance of Government contracts. All disputes arising in connection with the contract are initially considered by him or his authorized representative. The Contracting Officer, by virtue of the authority vested in him by the disputes clause in most Government contracts, is required to consider each dispute concerning a question of fact presented by the contractor and renders a decision as to what contract adjustment (time or money), if any, is to be made.

It should be noted that the disputes clause does not have a statutory basis but is rather a requirement of the Executive branch of the U. S. Government. It appears to be an attempt to provide and initially require the use of administrative dispute resolution procedures in order to avoid the delays and expense of litigation.

Contracts normally contain this standard disputes clause:

Article 15. Disputes - Except as otherwise specifically provided in this contract, all disputes concerning question of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime, the contractor shall diligently proceed with the work as directed.¹⁵

The Contracting Officer's duty is to administer the contract so as to avoid disputes whenever possible and to attempt to settle disputes by negotiation after they have arisen. If a mutually agreeable resolution of the dispute cannot be achieved through negotiations, the Contracting Officer will make a unilateral decision and the contractor is required by the disputes clause to continue

performance in accordance with that decision. Under the disputes clause system the Contracting Officer's decision on many small claims is, for all practical purposes, final. This fact is confirmed by Government research¹⁵ which found that two-thirds of the small businesses questioned indicated that they would not appeal an adverse Contracting Officer's decision on a claim of \$5,000 or less.¹⁵ The Contracting Officer, though an agent of the Government, is legally required to act independently and impartially in resolving disputes. This dual role of the Contracting Officer has led to much confusion and misunderstanding on the part of contractors. A Government report¹⁵ shows that the complex problem of disputes, which is extremely dependent on personalities, is not being handled effectively at the Contracting Officer level. The data indicates that 38 percent of all cases brought to the Boards of Contract Appeals are settled by negotiation prior to the Board decision.¹⁵ This apparent failure of the Contracting Officer is misleading since the contractor's refusal or inability to present sufficient evidence or persuasive arguments to the Contracting Officer is often the reason for failure in the early settlement attempts. However, the large number of cases settled at the Board level, along with widespread complaints of inadequate settlement prosecution, indicate that more settlement effort is needed.¹⁵

The Contracting Officer's unilateral decision on a contract dispute for which the contract provided an administrative remedy can be appealed by the contractor to the head of the agency or to a designated Board of Contract Appeals. If the time limits for filing

(usually 30 days) are not met, the Contracting Officer's decision becomes final.

Board of Contract Appeals

The contractor has two choices of administrative remedy with which to appeal an adverse Contracting Officer's decision: appeal to the agency head or appeal to the appropriate Board of Contract Appeals. If the dispute involves an alleged Government breach of contract for which the contract provided no administrative remedy, the District Court (for claims under \$10,000) or the Court of Claims, not the BCA has jurisdiction over the appeal. The BCA's were originally established to review disputes as representatives of the agency head but later received their legal basis in the contract disputes clause and in agency regulations, not from Congressional action. Most of the BCA's evolved to act as the delegated authority of the agency head as independent, quasi-judicial tribunals. Board members are typically lawyers licensed to practice in one of the fifty states or the District of Columbia and are appointed and promoted by the agency head. It is interesting to note that in July, 1966, there were 19 part- or full-time BCA's. By 1972, there were only 14 left.¹⁵ Some boards were abolished while others were consolidated. Many of the boards had not been operating on a full-time basis and this reduction effort was an attempt by the agencies to provide full-time, less biased, boards.

When a contractor appeals an adverse Contracting Officer's decision to a BCA, the Contracting Officer is required to provide

the Board and the Government's attorney with all information relating to that dispute. This information becomes the appeal file. One or more members of the Board are assigned to hold hearings and examine witnesses if deemed necessary or requested by either party. In addition to the material submitted by the Contracting Officer, the Board considers the pleadings, records of prehearing conferences, evidence presented in open hearings, briefs, and such depositions and interrogatories that are permitted. The Board's final decision is based on a majority vote of the members assigned to the case. Dissenting members at their option can attach their written opinions to the final text of the case.

A Government study,¹⁵ done in the early 1970's, found that 63 percent of the disputes appealed to the BCA system involved \$25,000 or less. The three largest BCA's had monetary appeals with the breakdown shown in Table 2.1.

TABLE 2.1
APPEAL VALUES

Board	Under \$25,000	Under \$10,000	Under \$1,000
Armed Services Board of Contract Appeals (ASBCA)	61%	48%	16%
General Services Administration Board of Contract Appeals (GSABCA)	81%	65%	23%
Engineer Board of Contract Appeals (ENGBCA)	49%	34%	11%

Contractors with claims that are not administratively redressable under the terms of the contract can file an appeal with the court system. Likewise, contractors who have received an adverse decision on their claim at the Board of Contract Appeals can also file an appeal to the courts based on the test of substantial evidence.

Relevant Legislation and Supreme Court Decisions

Before the appeals system of the courts can be discussed in detail, the Tucker Act and the Wunderlich Act (which provide the substantial evidence test by which Board decisions are appealed) and three Supreme Court cases must be reviewed.

The Tucker Act

The jurisdiction of the U. S. Court of Claims (which is located in Washington, D.C.) and the U. S. District Courts is based on the Tucker Act⁸ which was passed in 1887, and as amended is the basis for Title 28 of the United States Code. This Act, which limited claims to the U. S. District Courts to a maximum of \$10,000, was intended to create an integrated jurisdictional plan so that either the Courts of Claims or a District Court could provide equal opportunity for a fair trial and concurrent jurisdiction of like claims to the \$10,000 limit. All claims above that amount are heard in the Court of Claims. This allows the small claims to be decided in the local U. S. District Courts where the parties and witnesses reside, thus saving the claimant the expense and inconvenience of litigation in Washington, D.C.

The Wunderlich Case

Prior to 1951, it was generally accepted by contractors and the Federal Government that administrative decisions rendered under disputes clauses (shown earlier in this chapter) were final and conclusive and would not be reviewed by the Courts unless they were fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith.⁴⁴ However, this situation changed radically with the Supreme Court's decision in the Wunderlich Case, 342 US 98.²⁶

The Wunderlich Construction Company had contracted with the Department of the Interior to construct the Vallecito Dam in Southern Colorado. The dam was completed in October, 1941, two months ahead of schedule for the price of \$2,222,965.30. After completion of the construction project, Wunderlich submitted 42 claims totaling \$463,547.00, and requested a Contracting Officer's final decision. When eight claims for a total of \$53,189.63 were granted, Wunderlich appealed that adverse decision to the Secretary of the Interior as the Head of the Department. When the firm was again denied, it took the case to the U. S. Court of Claims (117 Ct. Cl. 92) where the decision of the Contracting Officer was set aside.

The Government brought certiorari, appealing the decision to the Supreme Court. The U. S. Supreme Court held that there was no finding of fraud (defined as conscious wrongdoing with intention to cheat or be dishonest)²⁶ at the Court of Claims level. The fact that the decision of the Secretary of Interior was found to be arbitrary, capricious, and grossly erroneous was deemed insufficient to overthrow the finality of the decision of the department head. The net

effect of the Wunderlich Case was that the decision of the department head would be final under the plain meaning of the contract unless fraudulent conduct could be proven.

The Wunderlich Act

In 1954, in response to the implications of this Supreme Court decision, Congress passed Public Law 356--83rd Congress (41 USC 321-322) which was also called the Wunderlich Act.⁹ One of the major provisions of this Act is:

That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.⁹

The writer believes that the key point of the above portion of the Wunderlich Act is that a Board of Contract Appeal's decision could now be appealed on the basis that it was either fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or because it was not supported by substantial evidence. Fraud was no longer the only basis for appeal.

The principal effect of this clause and the Wunderlich Act in general was to broaden the criteria for judicial review of administrative decisions concerning the disputes clause found in Government contracts. The Act attempted to make administrative decisions on

questions of law not binding on reviewing courts and administrative decisions on questions of fact not binding on reviewing courts if the decision could be proven to be "fraudulent, capricious, or so grossly erroneous as necessarily to imply badfaith, or not supported by substantial evidence."⁹

The question of "substantial evidence" found in the above quote of the Wunderlich Act was a common term used by the legal profession. Mr. Robert L. Stern, a distinguished lawyer and legal scholar, in his famous 1944 Harvard Law Review article,⁶⁵ provided this widely accepted definition of "substantial evidence":

In dealing with . . . an administrative finding, the court examines the evidence to determine whether there is sufficient evidence from which a reasonable man might have reached the conclusion under review; it cannot set aside the findings or verdict merely because it would have reached a different result itself.

Further discussions of the Wunderlich Act must include its interpretation by the Supreme Court as presented in the next section.

Major Rulings of the Supreme Court

During the period from 1963 to 1969, there were three major Supreme Court cases which significantly changed Government contracting procedures. In 1962, in the case of the U. S. versus Carlo Bianchi and Comapny, 373 US 709,²⁴ the Supreme Court concluded that by virtue of the terms of the Wunderlich Act, which prescribed the standards for judicial review, all U. S. District Courts and Courts of Claims were precluded from conducting their trials de novo (i.e., conducting a new trial which collected new evidence, etc.), whenever an appeal of a BCA decision was made concerning a question of fact. According

to the Supreme Court, these lower courts were limited, aside from any questions of fraud, etc., to consider only that evidence contained in the record made before the Board of Contract Appeals.

The rule was further refined in the U. S. versus Utah Construction and Mining Company, 384 US 394²⁵ (1966), which involved a claim for breach of contract. The Supreme Court noted the distinction between "breach" claims and claims under the contract and ruled that with respect to breach claims a contractor need not obtain a decision from the Contracting Officer or appeal to the BCA because neither had jurisdiction based on the contract to render a decision on breach of contract claims. Instead, the contractor could file suit directly against the Government in a U. S. District Court or the Court of Claims. The Supreme Court further stated that the Federal Courts were precluded from conducting a trial de novo on any issues of fact common to both the breach action and matters relevant to any dispute arising under the contract.

The last of the three Supreme Court cases pertinent to this discussion was U. S. versus Anthony Grace and Sons, Incorporated, 384 US 424.²³ In the development of that case, the Court of Claims had reversed the action of a Board of Contract Appeals which dismissed a dispute for a lack of timely appeal. The Government appealed the decision to the Supreme Court which upheld the Court of Claims decision and required that the appeal be remanded (i.e., sent back for further actions) to the Board of Contract Appeal for a complete hearing on the facts of the case.

Impact of the Supreme Courts' Decisions
Concerning the Wunderlich Act

The Courts

The net effect of the Supreme Court's interpretation of the Wunderlich Act was that a contractor appealing an adverse BCA decision concerning a question of fact to the Court of Claims would not receive a new trial. He would instead submit to the court for review, the record of the proceedings before the Board, stating his reasons as based on the Wunderlich Act, why the decision of the Board should not be final. The Government would present their arguments for finality of the board decision and the judge from the court would then review the evidence and render a decision. It was no longer possible therefore to obtain a new trial in the Court of Claims on appeals from board decisions that were considered to be based on a question of fact. Breach of contract claims which were appealed directly to the courts, and appeals from board decisions on questions of law were, however, tried de novo.

The impact of these Supreme Court decisions was to stagnate the entire court system. On cases appealed concerning questions of fact, the court would spend as much time and effort reviewing a prior board decision as would have been required for a new trial of the facts. The court was limited to examining the record of the board proceedings and could not examine what the court believed were the merits of the case. If the record of the board action was defective or inadequate, the court could not remedy these defects but had to remand the case to the board where it was reopened to take

further evidence. The court could only rule on the motion that was appealed. Once the court decided on that question, they had to return the case to the agency where the Contracting Officer would negotiate the amount of any settlement. These procedures caused turmoil in the courts and agencies. Numerous unfortunate cases were bounced between the court and agency like a ping-pong ball, while the substance of the case was largely ignored.

The lengthy time period required to initiate court action, combined with the problems of the BCA opening a case that was several years old, made witnesses and records for both sides hard to find. The time of lawyers and the court's time was therefore being wasted on matters unrelated to the merits of the case.

The Agencies

Since many of the cases being heard at that time dealt only with procedural matters, agencies found it difficult to obtain court decisions which were based on the merits of a Government contract clause and could guide them in settlement procedures in their own decisions. The change to the substantial evidence test by the Wunderlich Act also caused disruptions in the agencies. Agency decisions prior to the Wunderlich Act could not be overturned by the courts except by a finding of overwhelming evidence in the record contrary to the decision of the agency. Therefore, the new substantial evidence test caused huge records to be initiated by both parties. Board cases that had previously been considered long if they had taken over two weeks began to require up to seven months.

As a result of the Supreme Court decisions, appeals to the board became the only hearing on the merits of the case. Contractors and their counsel then began to demand that additional formalities such as subpoena power, prolonged discovery, and other time consuming pretrial procedures which were more characteristic of the courts, be used in appeals to the BCA. With the increase in the due process of law at the boards, they could no longer provide a relatively informal, expeditious, and inexpensive remedy. While their procedures became more judicialized and expensive, they could never provide a remedy equivalent to that available in the independent court system with the traditional procedures and safeguards which insure even-handed justice. The problems were apparent, the solution less so.

The Contract Disputes Act

Report of the Commission on Government Procurement

On November 26, 1969, a Commission was appointed by the President, the President of the Senate, and the Speaker of the House, to study the federal procurement process and provide recommendations for corrections and improvements. The Commission included two senators, two members of the House, and the Comptroller General of the United States.

On December 31, 1972, the Congress was provided with a report which consisted of six volumes distilled from two years of intensive study by the Commission and its staff. The report recommended 149

changes in the overall federal procurement process, including the following 12 which were specifically directed at the contract disputes area:¹⁵

Recommendation 1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.

Recommendation 2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.

Recommendation 3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.

Recommendation 4. Establish a regional small claims board system to resolve disputes involving \$25,000 or less.

Recommendation 5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration of performances of contracts entered into by the United States.

Recommendation 6. Allow contractors direct access to the Court of Claims and district courts.

Recommendation 7. Grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions.

Recommendation 8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.

Recommendation 9. Modify the present court remand practice to allow the reviewing court to take additional evidence and make a final disposition of the case.

Recommendation 10. Increase the monetary jurisdictional limit of the district court to \$100,000.

Recommendation 11. Pay interest on claims awarded by administrative and judicial forums.

Recommendation 12. Pay all court judgments on contract claims from agency appropriation if feasible.

The Commission stated that one of the major problems with the procurement system as it existed was that the BCA's were attempting

to perform a dual role--that of a due process court and that of an expeditious, economical administrative disputes resolving forum.

The Commission found that the existing system had often failed to provide the procedural safeguards of due process that should be the right of the litigants. Contractors were forced to process disputes to the BCA which were essentially independent and objective but lacked the procedural authority to insure that all the relevant facts and issues of complicated cases were brought forward and given adequate consideration. The BCA lacked adequate discovery and subpoena powers. It was also found that not all boards were of the same high standard or totally independent of the agency head. In some cases the judges were appointed by the agency head and depended upon them for career advancement.

In the opinion of the Commission, the old system was often too expensive and time consuming to provide effective justice to the contractors and the Government. Small business firms with small claims were often placed in a position where the amount of money required to pursue a claim equalled or exceeded the amount of the claim. Therefore, it was felt that only the larger well financed contractors could recover their claims under the old system. The rest could not. The relative cost of recovery of small claims represented a waste of resources.

The Commission, in summarizing its recommendations for improvements in the existing disputes-resolution procedures stated that its objectives were to:¹⁵

Induce resolution of more contract disputes by negotiation prior to litigation.

Equalize the bargaining power of the parties when a dispute exists.

Provide alternative forums suited to handle the different types of disputes.

Ensure fair and equitable treatment of contractors.

Legislative History of the CDA

After the Report of the Commission was published, the need for reform was no longer in question but there were wide differences of opinions concerning both the basic philosophy and the details of exactly what legislation was needed. The first disputes bill was introduced in 1975 in the U. S. House of Representatives by Peter W. Rodino.¹⁰ It was followed by eight more bills including U. S. HR 11002,¹¹ cosponsored by Representatives Herbert E. Harris and Thomas N. Kindness in 1978, which ultimately became the basis for the CDA. When Senator Lawton Childes, a former member of the Commission, introduced his version of the CDA (which closely resembled the Harris-Kindness bill) in the Senate in late 1978, he noted:

Government contracting is coextensive with Government itself. Inefficient, unfair procurement procedures are not in the Government's best interest. Not only are essential contractors driven out of competition for Government contracts, but those who remain are forced to submit consistently higher bids at the taxpayer's expense. The point is of course, that procurement procedures, if they are to be in the national interest, must be fair to both parties to a Government contract. Otherwise, both parties to the contract are poorly served.¹³

It is important to note that Senator Childes' introduction of the bill occurred while the 95th Congress was in its closing days. Because of Congressional procedures related to the amount of time left in the session, the Childes' Senate bill could only pass upon the consent of each member of the Senate. For this reason, all Senators had

the practical power to rewrite the bill. As a consequence, several last minute changes were made which were not fully discussed or reviewed. There was no legislative history to record the intended meaning of the changes.

The heavily amended Chiles bill was passed by the Senate at 2:00 A.M. in the waning moments of the 95th Congress.⁴³ The House then amended the Harris-Kindness bill to conform to the Senate bill and passed it on the last day. The last minute passage of the Act in its much amended form has resulted in many uncertainties which have raised both questions and problems.

Chapter Summary

The system of resolving disputes under Government contracts has been an evolutionary one following the enactment of the Wunderlich Act and a later series of Supreme Court decisions. Through these decisions the Supreme Court judicialized the administrative procedures by placing more emphasis on due process, independence of boards, judicial review of board decisions, and the remand practice.

These decisions caused the boards to adopt more judicial-like procedures and to demand still additional procedures such as discovery and subpoena powers. These changes caused boards to lose the qualities of being an expeditious economical disputes-resolving forum for which they were originally created. The Commission on Government Procurement emphasized numerous problems in the disputes-resolution process of federal procurements. The Contract Disputes Act of 1978 was an attempt to resolve most of these problems. It will be discussed in detail in the next chapter.

CHAPTER III

THE CONTRACT DISPUTES ACT AND ITS IMPLEMENTING REGULATIONS

Introduction

The analysis of the Contract Disputes Act is presented in this chapter. Indications of how it is believed the courts will interpret the various sections are provided. A detailed review of the full text of the Disputes Act, which is presented in Appendix A, will indicate that only those sections of the Act which are considered to be relevant to the U. S. Army Corps of Engineers are examined. The standard disputes clause which the Office of Federal Procurement (OFPP) dictated should be used in all executive agency contracts, as well as the new standardized BCA procedures derived from the Contract Disputes Act will also be reviewed. Figure 3.1 depicts the disputes resolution process after the implementation of the CDA.

The Contract Disputes Act

Section 5 Fraudulent Claims

Section 5 of the Act is perhaps the most troublesome portion for contractors. This section states that if the contractor is unable to support any part of his claim due to misrepresentation of fact or due to fraud, he will be liable to the Government for that

Government or contractor can appeal.
 Direct access from Contracting
 Officer decision.
 Power to take additional evidence.
 Trial de novo remand not required.

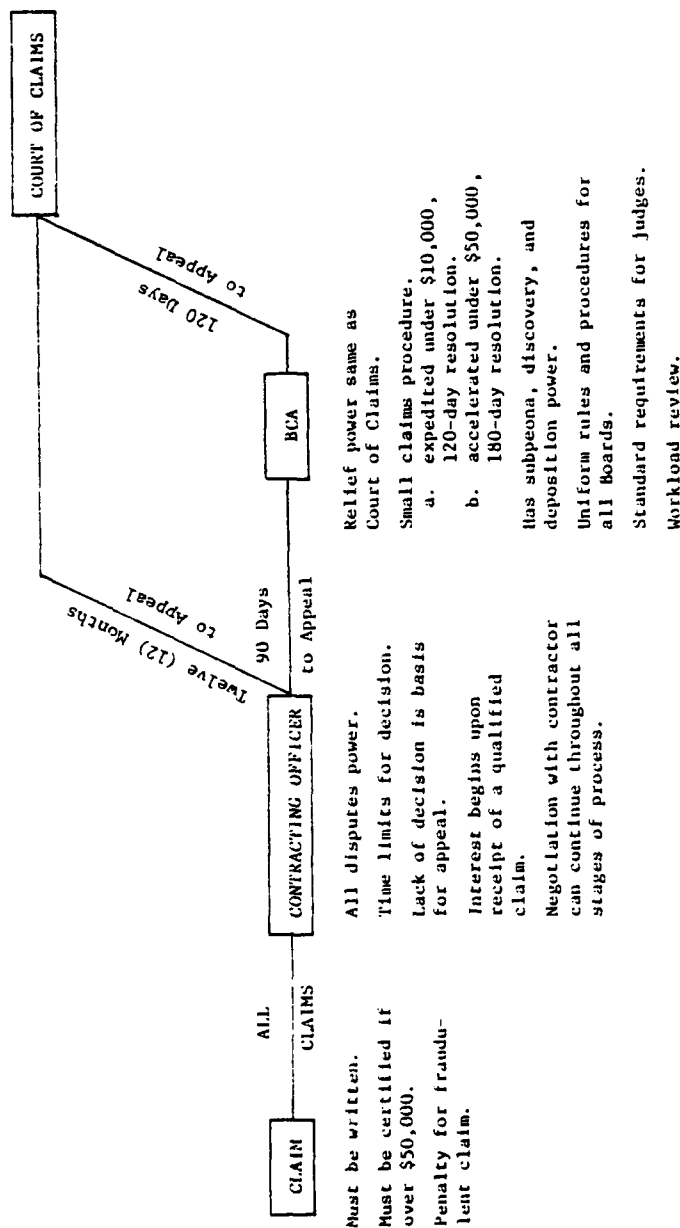


Figure 3.1. Dispute Resolution Process After the Contract Disputes Act.

unsupported portion of the claim and all of the costs incurred by the Government in reviewing that portion. The statute of limitations of his liability is six years from the commission of the misrepresentation of fact or fraud.

A contractor often submits claims for work performed which he perceives is not covered under the provisions of the contract. These claims, as a rule, are ultimately settled for less than the amount originally requested. A general reluctance on the part of the contractor to continue in disagreement with the client, the cost of processing a claim, or a cash flow problem are all legitimate reasons for accepting a lesser amount than initially requested. It appears that Section 5 was not included to address this situation. Its true purpose was probably to discourage the "horse trading" approach often used by some contractors.

Such a situation would occur if a contractor had a valid claim for \$50,000 but requested \$100,000 contemplating that in the course of the negotiations he would settle for somewhere between \$50,000 and \$75,000. The Contracting Officer would also be pleased, believing that he had saved the Government up to \$50,000, when in reality the claim had probably cost the Government more than it should.

In the final analysis, Section 5 may in fact always cost the Government more money than it saves. Contractors, both honest and otherwise, will now be required to establish clearly and precisely the exact amounts of their claims. This will necessitate a more detailed approach in the monitoring of costs so that they can:

- (1) recognize a claim when one occurs and
- (2) document it for

reimbursement. This will also require exact pricing of modifications and change orders, perhaps on the pessimistic or high side when the claim is submitted so as to avoid prosecution under this Section. Of course, any additional cost incurred because of this additional accounting workload will undoubtedly be passed along to the Government with no corresponding benefit.

Section 6,
Decision by the Contracting Officer

One of the key points in the Contract Disputes Act is found in the first few words of this section: "All claims by the contractor . . . shall be submitted to the Contracting Officer for a decision."⁷ This wording does not distinguish between claims "arising under" the contract and those "in breach" of the contract. This power, when combined with the standard disputes clause of Government contracts stating that the contractor must continue performance based on the Contracting Officer's decision until the decision is overruled by a higher authority, creates a great potential disadvantage to the contractors. In the extreme case without the right to stop work, a contractor constructing a building under a Government contract could be given a change order to construct a second building. Technically he must comply until the decision is overruled. Since the contractor is deprived of his right to stop work, this situation is considered to be illegal by many contractors. Some more realistic examples of Government breach could be a Government failure to make progress payments, Government interference with performance, or the issuance of a cardinal change, and so forth.

This section also states that all claims by the contractor shall be made in writing and submitted to the Contracting Officer. As noted in Figure 3.1, if the claim is for more than \$50,000, the contractor must certify that: (1) the claim is made in good faith, (2) the supporting data is accurate and complete, and (3) the amounts claimed are those for which the contractor believes the Government is liable.

The Contracting Officer must issue all his decisions in writing, stating the reasons for the decisions and informing the contractor of his rights to appeal under the act. With regard to the Contracting Officers' decisions, the Contract Disputes Act states that "Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceedings."⁷ On any claim of \$50,000 or less, the Contracting Officer is required to issue his written decision within 60 days or less after a receipt of the contractor's written claim. For claims over \$50,000, the Contracting Officer, within 60 days of receipt of a written certified claim, must issue his decision or inform the contractor of the period of time within which a decision will be made. The lack of a decision or other action after the stated period is over should be taken as a negative decision by the Contracting Officer. The contractor is then allowed to proceed either to the Board of Contract Appeals or directly to the Court of Claims.

Section 7

Contractor's Right of Appeal to the Board of Contract Appeals

This section sets the time limits for contractors to appeal an adverse Contracting Officer's decision to the BCA. As noted in Figure 3.1, contractors have 90 days from receipt of the Contracting Officer's decision in which to initiate an appeal to the appropriate BCA. The BCA and its operation are discussed in Section 8.

Section 8

Agency Boards of Contract Appeals

This section states that boards shall consist of a minimum of three members who will have no other duties that could be construed as interfering with their primary duty as a board member. They will be compensated at the rate equal to that of a GS-18, GS-17, and GS-16, based on whether they are the chairman, vice-chairman (if the position is required), or member, respectively. This clause required the resignation of a total of seven military judges serving on the Engineer Board of Contract Appeals and the Armed Services Board of Contract Appeals. Several of the judges resigned from the military and returned to the BCA as civilians.

Workload studies of the volume of contract claims are to be used to determine the justification of each of the agency boards. These studies will be updated and reviewed every three years by the Administrator for Federal Procurement Policy to determine if the number of judges or even the board itself is still justified. If a board is found to no longer be justified, as occurred in the case of

the NASA Board, their workload will be assigned to another agency's BCA.

Board members will be selected in the same manner as hearing examiners and appointed pursuant to section 3105 of Title 5 of the United States Code. Additionally, they will be required to have a minimum of five years experience in public contract law. The chairman and vice-chairman are selected by the agency head from the members appointed.

The agency board is directed by the Act to provide "to the fullest extent practicable, informal, expeditious, and inexpensive resolutions of disputes" ⁷ Their decision must be furnished in writing to the contractor and the Contracting Officer. Despite this less formal process, the Act states that "the agency board is authorized to grant any relief that would be available to the litigant asserting a contract claim in the Court of Claims." ⁷

The boards are directed to make available to the contractor, at his sole option, a procedure for accelerated disposition of an appeal of a Contracting Officer's decision where the amount was \$50,000 or less. Appeals under this procedure should be resolved within 180 days of submittal by the contractor whenever possible.

The contractor has the option of appealing the BCA decision to the Court of Claims. Additionally, the Government, in the person of the agency head, with prior approval from the Attorney General, can also appeal a decision to the Court of Claims. Appeals by either party must be initiated within 120 days of receipt of the BCA decision.

Section 9
Small Claims

This section as noted in Figure 3.1, requires that an expedited procedure be available to a contractor, again at his sole election, for claims of \$10,000 or less. These claims will be decided by one member of the board (with such concurrences as required) under new simplified rules of procedure which facilitate the decision. Claims shall be resolved under this procedure whenever possible within 120 days from the date on which the contractor elects to utilize such procedure. The administrator is authorized to adjust the financial boundary which defines a small claim every three years based on current economic indices.

Up to this point, Section 9 appears to be a real blessing to the contractor. However, Section 9(d) and 9(e) state that all decisions "reached under the small claims procedure shall be final and conclusive and shall not be set aside except in case of fraud."⁷ Additionally, the decisions will have no value as precedent for future cases under the Act. It appears that the "no appeal" stipulation is a high price to pay for the possible gain of payment 60 days earlier than would be normally expected when proceeding under the accelerated procedures of this Act.

Section 10
Actions in Court: Judicial
Review of Board Decisions

This section provides the contractor with the option of bringing his claim directly to the U. S. Court of Claims in lieu of appealing the Contracting Officer's decision to a BCA. The appeal

must be filed with the Court of Claims within 12 months from the date of receipt of the Contracting Officer's decision concerning the claim. The Court will proceed "de novo" with the hearing of the claim. This option of the contractor cannot be denied by any contract provision, regulation, or rule of law to the contrary.

Paragraph (3) (b) of this section states that in the event of an appeal of the contractor or the Government from a decision of any agency board, "notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence."⁷

It should be noted that the majority of the decisions rendered by the boards are ones of fact and therefore are not normally appealable. Since the contractor does possess the option of direct access to the Court of Claims, he can save himself and the Government time, money, and effort by appealing questions of law directly to the Court. This, of course, removes one appellant level from the contractor's chain. This situation also works in reverse. A recent case that was appealed directly to the Court was remanded to the appropriate board, with the Court stating that it could be better resolved at that level.⁸³

The Court may also order consolidation of suits for the convenience of the parties or witnesses or in the interest of justice. In a multiparty claim, cross-claim, or third-party claim,

the Court may also divide the claims and enter a judgment on one or more, but fewer than, all of the claims.

In an appeal of a board decision, the Court may render an opinion and judgment and remand the case for further action by the agency board. The Court can, in lieu of remand, retain the case and take additional evidence or action as it deems necessary for final disposition of the case.

The wording of this section indicates that the BCA's have retained their authority on questions of fact while the Court of Claims will still consider and decide on questions of law. Additionally, the alternative to the remand practice will decrease the possibility of a claim being batted back and forth as the proverbial ping pong ball between board and courts since the courts will be able to reopen the case to take additional evidence when required.

Section 11

Subpoena, Discovery, and Deposition

A member of the Board of Contract appeals can, based on this section, administer oaths to witnesses, subpoena witnesses, texts, and documents, and authorize depositions and discovery proceedings. In the event of refusal by the party being subpoenaed, the U. S. District Court can order the person, if living within the jurisdiction of the Court, to appear before the agency board or produce the evidence requested. Failure to do so is considered contempt of court and may be punished accordingly. The board must, however, receive approval from the Attorney General to request a subpoena from the District Courts.

Section 12

Interest

This is perhaps the most favorable section of the Contract Disputes Act for the contractor. It states that interest on the amount of the claim found due the contractor shall be paid from the date the Contracting Officer accepts the claim until payment thereof. Simple interest will be paid as computed at the rate established by the Secretary of the Treasury and published in the Federal Register. At the time of passage of the Contract Disputes Act, the interest rate was established by Public Law 92-41 for the Renegotiation Board. But, the Renegotiation Board is no longer in existence so a six-month rate is now published in the Federal Register.

The writer believes that it is important to note that if the claim is over \$50,000 it must be certified as per Section 6 of this law before being considered as a valid claim. The interest provision along with the time restrictions of Section 6 have required that Contracting Officers issue more speedy decisions. No longer can a claim be put on the back burner in hopes that it will be forgotten.

Section 13

Appropriations

Any monetary award, regardless at which level it was awarded, is paid by funds from the United States Department of the Treasury. Many times in the past, a contractor would be awarded a monetary judgment by the board or courts only to find that the agency coffers were empty. The contractor would then have to wait for the agency to seek Congressional action to appropriate funds for payment. With this new system, the contractor will be paid from the general revenues and the

agency will be required to reimburse the treasury when funds become available.

Section 16

Effective Date of the Act

This section set the effective date of the Contract Disputes Act as 120 days after its signing into law by the President. The Act was approved on November 1, 1978, and therefore became effective March 1, 1979. The contractor, on any claim from a pre-Contract Disputes Act contract pending before the Contracting Officer on March 1, 1979, or submitted thereafter, had the option of resolving the dispute based on the contract disputes clause in his contract or under the provisions of the Contract Disputes Act. All contracts with the U. S. Government entered into on or subsequent to March 1, 1979, contained the new disputes clause based on the CDA. This clause is discussed in the next section.

Implementation Regulations

As in all laws, the Contract Disputes Act outlines the general parameters under which the executive agencies must operate. The more detailed procedures are set forth in the regulations that are derived from the Act. In the case of the Contract Disputes Act, the Office of Federal Procurement Policy (OFPP) issued the Final Contract Disputes Regulatory Coverage and a Contract Disputes Clause.¹⁸ This was done in an effort to provide Government uniformity of language in contract clauses.

On two occasions, the Office of Federal Procurement published (in the Federal Register) interim regulations and requested comments

and recommendations for changes to the clauses. After evaluation of these comments, the Final Contract Disputes Regulatory Coverage and Contract Disputes Clause¹⁸ was published in the May 9, 1980, issue of the Federal Register.

The Department of Defense used these OFPP guidelines to change the Defense Acquisition Regulations (DAR) which regulate all Department of Defense contracting and procurement. The DAR changes which deal with the disputes clause of contracts are shown in Appendix C and are discussed in the following two sections.

Disputes Clause

The new disputes clause must be included in all contracts subject to the Contract Disputes Act. One problem quickly realized after the passage of the Act was that the term "claim" had not been defined. Would all submissions or requests for payments be considered as claims? To clearly differentiate between claims and simple vouchers requesting payment for work completed, the DAR were changed as follows:

As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. However, a written demand by the contractor seeking the payment of money in excess of \$50,000 is not a claim until certified.

A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim pursuant to the Act by complying with the submission and certification requirements of this clause.¹⁶

The disputes clause further states that the certification required by the contractor on all claims over \$50,000 (Section 6 of the Contract Disputes Act) shall be signed by the contractor, if an individual, or by the senior company official at the plant or location, or by an officer or general partner having overall responsibility for conduct of the contractor's affairs.

The pre-Contract Disputes Act procedures described in the first interim regulations issued by the OFPP concerning the contractor's right to stop work were retained. They stated that pending reversal of a Contracting Officer's decision the contractor must continue performance as per the Contracting Officer's decision. This statement combined with Section 6 of the Contract Disputes Act (see page 31) meant that all claims under, or in breach of the contract must be decided by the Contracting Officer. This effectively denied the contractor's right to stop work until the Contracting Officer's decision was reversed. Contractors and their legal staff complained extensively about this interpretation. Based again upon OFPP guidelines the Defense Acquisition Regulations were changed to read:

The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action arising under the contract, and comply with any decision of the Contracting Officer.¹⁶

On rare occasions when questions of national security or public health are involved, contractors may be required to perform despite breach of contract by the Government.

The Disputes and Appeals Clause

This section of the DAR was changed to better reflect the intent of the Contract Disputes Act. One of the first topics specifically discussed was the Government policy on settlement by mutual agreement. It states that the parties to a Government contract should if at all possible, resolve their disputes in such a manner (i.e., without litigation) at the Contracting Officer's level. Informal discussions by the parties involved should be conducted. If necessary, individuals representing each side that were not intimately involved in the previous dispute discussions should attempt to negotiate a settlement. This would remove possible personality conflicts from the actual issues.

The writer sees two problems with this process, the provisions for interest and for certification. The contractor is paid interest from the date of submission of the claim. It is questionable when this date occurs if negotiations are being conducted; therefore, the contractor is risking the loss of money in the form of interest. The second problem is that of certification. A claim for over \$50,000 is not considered submitted unless it is certified. After one of the top executives for the contractor has signed a statement certifying that this claim is accurate, complete, and represents the exact amount for which the Government is liable, it seems unlikely that the contractor would be eager to negotiate for a lesser amount, particularly in light of the new penalties for fraudulent claims. In one of the next paragraphs of the disputes clause, the contractor is reminded of the fraudulent claims penalty since the Contracting Officer is instructed

to refer suspected fraudulent claims to the Justice Department for prosecution.

The disputes clause also outlines the required actions of the Contracting Officer if the claim by or against the contractor cannot be settled through negotiations and the claim is submitted to him for a final decision. These actions are:

1. Review all the facts pertinent to the claim.
2. Obtain advice and legal assistance from the legal staff of his organization and perhaps that of his next higher headquarters.
3. Consult with all personnel such as those in the contract administration office and others who have dealt with the facts of the case.
4. Compile this information and advise and make his final decision.
5. Furnish a written copy to the contractor.

The final decision must, based on this regulation, contain a paragraph which substantially states:

This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Contract Appeals.

If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the Board of Contract Appeals within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, shall reference this decision, and identify the contract by number. For appeals under this clause you may, solely at your election, proceed under the Board of Contract Appeals small claims procedure for claims \$10,000 or less or their accelerated procedure for claims \$50,000 or less. In lieu of appealing to the cognizant Board of Contract Appeals you may bring an action directly in the U. S. Court of Claims, within twelve months of the date you receive this decision.¹⁶

The final decision must also describe the dispute, refer to the pertinent contract provisions that focus on the area of disagreement, state the facts of the case, and finally, give the Contracting Officer's decision with the supporting rationale.

The regulation that is derived from the CDA also highlights the fact that the Contracting Officer and the BCA now have the decision authority over both appeals within the contract and appeals in breach of the contract. As stated previously, the contractor's right to stop work in breach claims has been changed to the wording of the pre-Contract Disputes Act regulation. The requirements for certification of claims in excess of \$50,000 are also outlined.

Board of Contract Appeals Rules

The Contract Disputes Act required a number of changes to the rules of the BCA of all agencies. In order to provide a uniform wording of all board rules, the OFPP published proposed rules in the January 25, 1979, Federal Register requesting comments. The final rules¹⁷ were published March 7, 1979, in the Federal Register with a number of significant changes reflecting comments received by the OFPP.

Corps of Engineers BCA Rules. The Engineer BCA rules are essentially the same as those directed by the OFPP. Specifics such as the Board's address, location, phone number, and jurisdiction are of necessity different from other boards. The Engineer Board is composed of a chairman, vice-chairman, and three members, all of whom are licensed attorneys in a state, commonwealth, or territory.

The remainder of the BCA rules discussed in this chapter are uniform among all agency BCA's and are not specifically those of the Corps of Engineers. Many of the BCA rules are either repetitious of sections of the Contract Disputes Act or the dispute clauses or are simply rules of procedures. These will not be discussed in this thesis.

Submission of Appeal File. The Contracting Officer has 30 days from receipt of an appeal to submit to the BCA the information he had initially used to decide the claim. Additionally, the Contracting Officer must submit the contract specifications, amendments, plans and drawings, correspondence relevant to the appeal, transcripts of testimony taken, and any other pertinent data. The Contracting Officer must also provide the same appeal file (plans and specifications not included) to the appellant. The appellant has 30 days from his receipt of the appeal file to submit additional documents or information which he considers relevant in the case to the BCA. Two copies of all such information submitted to the BCA must also be submitted to the Government trial attorney.

Small Claims (Expedited) Procedure. Disputes for \$10,000 or less can be processed under this procedure at the sole election of the contractor. The Board has varied some of its normal rules of operation to meet the 120-day target of resolution of disputes. For example, the time for submission of the appeal file as discussed above is reduced to 10 days. Within the next 15 days an administrative judge is appointed to hear the case and will, in an informal meeting

or telephone conference with both parties identify the issues and establish an appropriate procedure and an expedited schedule for resolution of the appeal.

At the end of the hearing, if one is held, the presiding judge will normally render for the record an oral summary of the findings of fact, conclusions, and his decision on the appeal. Typed copies of the decision are provided at a later date.

Small Claims (Accelerated) Procedure. Claims of \$50,000 or less may be settled under this procedure, again at the option of the contractor. Written decisions by the Board in cases processed under this procedure will normally be short and contain only a summary of findings of fact and conclusions. One Administrative Judge, with the concurrence of the one other appointed Administrative Judge (in case of a disagreement the majority of three) shall render the decision. For cases of \$10,000 or less that are processed under this procedure rather than the expedited procedure, the decision of only the one Administrative Judge is required. An oral decision will normally be rendered and for purposes of appeals the date of commencement of the period for filing an appeal will be established as the date of receipt of a typed copy of the proceedings and decisions.

Chapter Summary

The Contract Disputes Act and the subsequent regulations and rules which implemented the Act are an attempt by the Government to provide a fair, balanced, and comprehensive statutory system with

both legal and administrative procedures to resolve Government contract claims. The theme of the Act is to attempt to negotiate dispute settlements before litigation becomes necessary. By providing alternative forums suitable to handle different types of disputes and equalizing the bargaining power of the parties in a dispute, the Congress has attempted to insure fair and equitable treatment of contractors and Government agencies alike.

This chapter reviewed the Contract Disputes Act and some of the rules and regulations used to implement the Act. The next chapter will review some of the legal interpretations of the Boards of Contract Appeals and the viewpoints of some prominent lawyers about the Contract Disputes Act.

CHAPTER IV

THE JUDICIAL SYSTEM'S INTERPRETATION OF THE CONTRACT DISPUTES ACT

Introduction

The Legislative and Executive branches of the Government provide the statutes and regulations by which we must all live and work. When a dispute arises between parties as to the interpretation of the laws or regulations, the Judicial branch provides the final decision. Their interpretation must be followed unless subsequently overturned by a higher court or repealed by further legislation (e.g., Wunderlich Act). It is therefore imperative that a review of any law include a discussion of cases decided by the appropriate judicial forum. As noted in Chapter III, the Contract Disputes Act requires that all claims be submitted to the Contracting Officer for a final decision. If the contractor receives an adverse decision he then has two avenues of appeal--the Court of Claims or the appropriate Board of Contract Appeals.

The CDA became law on March 1, 1979, and as of this writing no appeal cases under the law have been decided by the Court of Claims. Several cases are pending but, considering that the CDA allows the contractor one year from the Contracting Officer's decision to appeal to the Court of Claims and the case load of the Court, no decisions are expected in the near future. For this reason, the only cases

that will be examined in this thesis are rulings from the Board of Contract Appeals.

As noted in Chapter II, claims on contracts with the Corps are appealed to two Boards depending on the type of work. The majority of the contracts are under the Military Construction Army (MCA) program and appeals by contractors from these contracts are taken to the Armed Services Board of Contract Appeals (ASBCA). In Civil Works contracts which deal with the civilian construction of the Corps (such as flood control and associated work), claims are appealed to the Engineer Board of Contract Appeals (ENGBCA). The ASBCA is authorized 33 judges and is the largest and most recognized of all the BCA. By comparison, the next largest BCA is that of the General Services Administration which has 11 judges. The third largest is the ENGBCA with five judges. The ASBCA, as the name indicates, handles claims from all the military services and some executive agencies. The ASBCA report,⁵¹ for example, which covers activities for the fiscal year of 1979, showed that 1,028 cases were docketed during the year with the following breakdown:

<u>Agency</u>	<u>Number of Claims</u>
Army	331
Navy	227
Air Force	186
Defense Logistics Agency	218
Other Department of Defense (DOD)	4
Non-DOD Agencies	62

Several representative cases from both the ASBCA and the ENGBCA, which are listed in Table 4.1 according to subject matter, will be discussed in this chapter. Cases heard by the BCA are referenced by the name of the company making the appeal, the BCA hearing the case, and the docket number of the case. Some case histories contain the complete file of the dispute while others may only discuss the one motion on which a ruling is being made. For this reason the amount of background detailed in this thesis will vary among the cases.

It should be noted that not all of the cases were of quantum (e.g., involved monetary decisions). If money is part of the decision, the Board will often rule in favor of one party based on the claim and remand the decision of the amount to be awarded to the Contracting Officer who must negotiate with the appellant. In addition, not all of the BCA cases deal with the Corps, in fact, not all of the claims relate to construction contracts. They all have, however, set legal precedents for the subject areas which are listed in Table 4.1.

The ultimate implementation of the Contract Disputes Act will depend on the Board of Contract Appeals' decisions and Court decisions. Although it is difficult at this early date to clearly define what this final interpretation of the Boards of Contract Appeals and Courts will be, the writer has been able to assemble a number of precedent-setting cases as shown in Table 4.1. It should be understood that these cases are only the preliminary decisions concerning the Act and are presented in order to provide some background information for the reader's use in interpreting the results of the questionnaire and other data presented in Chapter V.

TABLE 4.1
BOARD OF CONTRACT APPEALS CASES

Precedent Area of Appeal	Name of Appellant Board - Docket Number
Pending Claims	E-Systems, Incorporated ASBCA - 21091
	Monaco Enterprises, Incorporated ASBCA - 23611
Applicability of CDA	Mathews - Chatelain - Beal ENGBCA - 4290
Timeliness of Appeals	Sofarelli Associates ASBCA - 24580
	Fortec Constructors ENGBCA - 4352
Certification Requirements	Harnischfeger Corporation ASBCA - 23918 and 24733
Interest on Claims	Inland Service Corporation ASBCA - 24043
	Robert Builders, Incorporated ASBCA - 24123
	A.L.M. Contractors, Incorporated ASBCA - 23792
Mutual Mistake	Pavco, Incorporated ASBCA - 23783
Unilateral Mistake	Edgemont Construction Company ASBCA - 23794

Claims Pending a Contracting
Officer's Decision

Accompanying any major piece of legislation such as the Contract Disputes Act and its follow on regulatory changes are a number of questions concerning the exact interpretation of the wording which was used. Prior to the Contract Disputes Act the issue of when a case was considered "pending before the Contracting Officer" had no real significance. With the initial implementation of the Contract Disputes Act this question became of vital interest. Claims pending a Contracting Officer's decision on March 1, 1979, were eligible for appeal under the Contract Disputes Act. Those not considered pending were not eligible for appeal under the CDA. The following two appeals were the test cases which addressed this question.

E-Systems, Incorporated

The above-named company entered into a Government contract in March 1974, for the production of 5,464 AN/PRC-77 military radios to be purchased for \$528 each and designated for contractually identified foreign military sale (FMS) purchases. During performance of the contract, the Government directed the appellant to divert 1,897 radios to a country not originally designated in the contract. The contractor was, at that time, attempting to contract the sale of the same radio to that same country at substantially higher prices. These Government-directed diversions necessarily precluded the consummation of the company's sales to the foreign customers. The contractor sought \$547,945.92 relief because of the lost sales.

The Government, on December 8, 1977, after receipt of this appeal moved to have it dismissed contending that the contract contained no provision under which such relief could be granted. Additionally, the Government claimed that the Board lacked the jurisdiction to reform a contract. The Board reserved consideration of this issue pending a hearing on the merits of the claim.

After the close of the hearing and prior to the submission of briefs, the appellant filed a motion seeking election to proceed under the Contract Disputes Act of 1978, contending that the expanded authority of the Board under the Act had rendered moot the jurisdictional issue and requested the Board assume complete jurisdiction as authorized under the terms of the Act.

Although the appeal had been heard by the Board and was at that time pending a decision, the appellant contended that a claim pending before the Board is still within the Contracting Officer's authority to settle and therefore still pending before the Contracting Officer. Based on this reasoning, the appellant was requesting the right of election to have its appeal considered under the provisions of Section 16 of the Contract Disputes Act.

Recognizing that the Contracting Officer retains the power and authority to settle and compromise a claim before a board or a court, the Government asserted there was a distinction between the pendency of the claim and the right to intervene and settle. They contended that a claim is pending before the Contracting Officer only until he renders a final decision and upon appeal it is then pending before the Board or Court.

On April 4, 1979, the Board denied the appellant's motion to proceed under the CDA stating "we consider that the matter is now pending solely before us."³³ This decision clearly showed that only claims actually pending or awaiting a Contracting Officer's decision on March 1, 1979, could elect to appeal under the provision of the Contract Disputes Act. In the next case, concerning the same issue, the circumstances were not as clear-cut and as a result there were extensive discussions of the same point.

Monaco Enterprises, Incorporated

The appellant of Spokane, Washington, was awarded a contract by the Corps of Engineers in August 1976, for the installation of equipment in Germany. Neither party contended that German Law was applicable and therefore the Board handled the claim for transportation expenses of \$11,258.68 as requested under the Contract Disputes Act.

In a letter to the Board, dated February 6, 1979, the appellant stated that the Contracting Officer's failure to render a decision on their claim purported to have been submitted on December 27, 1977, was considered a negative final decision and they were therefore electing to proceed under the accelerated procedure of the Contract Disputes Act.

A Contracting Officer's final decision, dated February 22, 1979, was issued and mailed. There was no record of the date of mailing but Monaco Enterprises stated they received the decision on March 2, 1979. The decision denied the claim based in part on the absence of any contract clause or bid item providing for the claimed transportation expenses.

On March 19, 1979, the appellant mailed its notice of appeal from the Contracting Officer's February 22, 1979, final decision. By further letter to the Board, dated March 20, 1979, the appellant stated the following:

It is our position that Monaco's appeal (even though filed prior to the effective date of the Act [March 1, 1979]) is properly governed by the election procedures of the new Act because the Contracting Officer's decision was not received by Monaco until March 2, 1979. Until the Contracting Officer's decision was received by us on March 2, 1979, the contractor's claim was still "pending" before the Contracting Officer. Indeed, until the Contracting Officer's final decision was received by us, the thirty-day appeal period could not begin to run.

In order to alleviate any questions concerning whether or not the Act is applicable to Monaco's claim, we are hereby withdrawing our prior Notice of Appeal and are now appealing the Contracting Officer's final decision received by us on March 2, 1979. In short, instead of appealing the Contracting Officer's non-decision, we are appealing his final decision received by us on March 2, 1979. Consequently, you will find enclosed a new Notice of Appeal electing to proceed under the Contract Dispute Act of 1978.³⁸ (Emphasis in original.)

The Board referenced the E-Systems case but it was distinguished from this one. The E-Systems case was substantially complete and awaiting a final decision when the appellant elected the CDA option. As in the Monaco case, no actions other than the election of the CDA procedures were complete prior to March 1, 1979.

The lack of legislative history concerning this point made it difficult for the Board to determine the exact interpretation Congress had desired when writing this portion. Without such information the BCA turned to two of the most accepted sources for exact definitions of the word pending. Black's Law Dictionary, Revised Fourth Edition, included the following definition:

PENDING. Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is "pending" from its inception until the rendition of final judgment.

Webster's Third New International Dictionary includes the following definitions of pending:

Through the period of continuance or indeterminacy of:
DURING . . . , until the occurrence or completion of: while awaiting; not yet decided; in continuance; in suspense

These definitions provide persuasive support for the conclusion that a claim is not pending before the Contracting Officer after he has disposed of it by his decision. Once the claim is determined, there is no further processing of it at the Contracting Officer level.

Despite the argument presented above, several portions of the CDA make reference to the "receipt of a decision." Section 7 states that the time allotted for appeal is "within 90 days from receipt of a Contracting Officer's decision" and Section 10(a) (3) provides for "filing an action in the Court of Claim within one year after receipt of the decision."⁷

Considering both arguments, the BCA stated in its final decision that the words, "before the Contracting Officer," limit "pending," and it strains those words to interpret them as extending to a period beyond the issuance of the decision.³⁸ They found little basis for a departure from the ordinary meaning of pending which implies prior to the issuance of the Contracting Officer's decision. Based on the absence of legislative history suggesting such other interpretations, the BCA stated that claims cease to be pending before the Contracting Officer as of the dates the respective final decisions were mailed.

Accordingly, these appeals could not be processed pursuant to the Contract Disputes Act.

Summary

The two above cases resolved the question of which claims could be appealed under the provisions of the Contract Disputes Act. Claims pending on March 1, 1979, at any level other than that of the Contracting Officer, could not elect to proceed under the provisions of the Contract Disputes Act. Claims decided and mailed by the Contracting Officer prior to March 1, 1979, were not considered pending his decision.

Applicability of the Contract Disputes Act Mathews - Chatelain - Beal

As mentioned in the previous chapter, the Contract Disputes Act was intended to only be applicable to Government contracts entered into with the executive agencies of the United States Government. This case involved a dispute of the above-mentioned client (M-C-B) and the Washington Metropolitan Area Transit Authority (WMATA) which is an instrumentality of two states and the District of Columbia. The Engineer Board of Contract Appeals had been designated by the WMATA Board of Directors in their contract with M-C-B to hear contractor claims against the WMATA.

The appellant's claim deals with fourteen modifications performed in good faith by both parties under a mutual mistake. The appropriate overhead rate of payment was however, not used. That

mistake, it was claimed, stemmed from an early WMATA audit which a subsequent WMATA audit showed to have been substantially wrong. By way of relief, the appellant requested the Board to reform the contract increasing the contract price by an additional \$302,732.00.

The WMATA argued that the appellant is not entitled to a hearing before the Board because the Board was without jurisdiction to reform a WMATA contract. The appellant conceded that the WMATA was not a federal agency, but argued that the CDA gave Federal Boards of Contract Appeals jurisdiction over "all disputes" and therefore, that it was appropriate for the ENGBCA to assume like jurisdiction over appeals arising under WMATA contracts.

The Board disagreed stating that its jurisdiction existed by consent of the parties and not by a legislative fiat. The disputes clauses of the WMATA contracts was essentially the same as that of the pre-CDA federal contracts. It was well established that BCA possessed no jurisdiction under the old standard disputes clause to reform a contract. In 1937, the Court of Claims established the principle that jurisdiction under the disputes clause was limited to the remedies made available by specific provisions of the contract. The BCA's conclusion was that they had no authority to reform the contract and suggested that the appellant like any other party involved in a dispute with a state or local government, sue WMATA in a court of competent jurisdiction.

The writer believes that this decision will have extensive implications for the Corps of Engineers which is managing billions of dollars of construction in Saudi Arabia. It sets the precedent that

contractor claims must be handled under provisions of the contract; they cannot be based on the CDA since the Saudi Government is the owner in these contracts. The Corps is only a construction manager.

Timeliness of Appeals

Prior to the CDA the contractor had 30 days from receipt of an adverse Contracting Officer's decision to appeal to the appropriate BCA. As a general rule boards had provided extensions of time for procedural actions when it was considered to be appropriate and justified. The following two cases have set the precedent for timeliness of appeals under the CDA.

Sofarelli Associates, Incorporated

The appellant's claim for \$23,019 was denied by the Contracting Officer by letter dated August 15, 1979. The letter was mailed to the address given on the contract. On August 20, 1979, an accountant for the firm received the letter and then mailed it to Mr. Fiorillo, the project manager, who was located in the Virgin Islands. Mr. Fiorillo stated that the mail to the Islands was very sporadic and that he received the letter in the second week of December. On January 3, 1980, Mr. Fiorillo hand carried his notice of appeal to an attorney for the Department of the Navy who delivered it to the Board on January 4, 1980.

Mr. Fiorillo argued that his accounting employees had no authority to act in negotiating a claim and that he alone could act on the final decision. Based on this fact, his receipt of the decision

in December should be the reference date from which an appeal could be made. Additionally, he cited two previous Court of Claims decisions and Interim Rule 33 of the ASBCA which provides for extensions of time for procedural actions where appropriate and justified.

The Board stated that they regarded timely compliance with the CDA to be jurisdictional in nature, and not a mere procedural action, and not subject to the consideration presented by the appellant. The Board cited the Department of Transportation Contract Appeals Board which had recently stated:

Now the Boards must consider the mandate of the Act which sets a limit upon the time for entertaining appeals. We believe that the Boards no longer have discretion to waive the late filing of appeals.

(Avon C. Brown Inc. No. 1082)⁴¹

The ASBCA had the same view of this case and therefore dismissed the appeal.

Fortec Constructors

This firm was encountering a differing site condition on a project which adversely affected its pile-driving operations. The Government's contention was that the appellant's difficulties were due to improper construction processes. By letter dated July 23, 1979, the appellant requested a final Contracting Officer's decision. A decision denying the claim was delivered to the appellant on August 25, 1979. It contained the standard clause advising the appellant of his options to proceed under his contract dispute clause or under provisions based on the CDA. The decision also stated "Please advise this office if you elect to have this dispute subject to the

Contract Disputes Act of 1978." The appellant submitted his appeal on October 29, 1979, 72 days after receipt of the Contracting Officer's decision. It contained no reference to the disputes clause or to the CDA. However, by letter dated February 6, 1980, the appellant's counsel advised the Board of its election to proceed under the CDA.

The Government in this action moved to dismiss the claim based on the appellant's failure to meet the 30-day submission time frame under the contract disputes clause and his further failure to declare his action to proceed under the CDA within 90 days of receipt of the Contracting Officer's final decision.

The Board disagreed with the Government's contention stating that the appellant, by statute, was entitled to proceed under the Act if it so elected. This decision was based in part on the ability of a contractor whose claim was pending before the Contracting Officer on March 1, 1979, to also have an unrestricted right to elect to proceed under the CDA. It was felt that once the election was made, the 30-day limitation period to which the parties agreed in the disputes clause of their contract was subsumed by the longer period provided in the CDA. The motion to dismiss was therefore denied and the appeal was heard.

Summary

The interpretation of the Board of Contract Appeals in the above two cases was that the time limits specified in the CDA are absolute. The time for appeal of a Contracting Officer's decision to the BCA has been extended from 30 days as stipulated in the old disputes

clause to 90 days. This time is considered sufficient and time waivers beyond that period will not be automatically granted. The Board did allow contractors who had submitted appeals within the time frame of 90 days from the Contracting Officer's decision but without a stipulated election of the CDA to elect to proceed based on the CDA.

Requirement for Certification
Harnischfeger Corporation

The CDA is specific in its requirements for certification on claims over \$50,000 submitted to the Contracting Officer. This case dealt with a claim filed by the Harnischfeger Corporation against the U.S. Army Tank and Automotive Material Readiness Command for a sum exceeding \$17.5 million. As would be expected on a claim of this amount, discussion by both parties was conducted for a period of over a year in an attempt to negotiate a settlement.

The claim which was submitted to the Contracting Officer on December 7, 1979, requested that the contract and all amendments be rescinded and reformed to reflect the breach of contract by the Government, together with damages as determined at the time of trial, and for such other and further relief as the Board or Court would deem just and proper. The following certification was provided:

I, Dean Francis Pace, Counsel to Harnischfeger Corporation, certify that the claim for breach of contract, mutual mistake, rescission, and reformation are made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.³⁵

Although no claim for a specific, unqualified sum had been asserted, the appellant's counsel wrote the Board on December 11, 1979, advising that the appellant elected to proceed under the CDA and that this certification was for the amount of damages awarded by the Board or the Court. A prehearing conference was requested by the appellant and was convened on January 22, 1980. At that time the Government moved for a dismissal based on a lack of proper certification since no specific amount was claimed. The appellant's counsel presented another certification signed by himself which stated:

Harnischfeger Corporation prays that Contract DAAK01-73-C-5981, including all amendments thereto, be rescinded and reformed to reflect the breach of contract by Government, together with damages in the total sum of \$17,528,073.00 as amended according to proof at the time of trial, and for such other and further relief as the Board or Court may deem just and proper.³⁵

The Board advised both parties that the Government's pending motion for dismissal would be held in abeyance until the Contracting Officer had rendered a decision on the latest letter of certification. On January 30, the Contracting Officer declined to accept the certification of January 21, 1980, for the following reasons: (1) failure to certify the claim as required by the CDA; and (2) failure to provide certification by the contractor (i.e., by an appropriate corporate official). Two days later a third letter was submitted to certify the claim. The only difference was that it was now signed by the General Counsel and the Corporate Secretary.

By telephone on February 1, 1980, the appellant's counsel requested that the Contracting Officer not act on the propriety of the certification and requested that the matter be ruled upon directly by the Board. The Government agreed, and upon concurrence of the Board,

they considered the matter without prior action of the Contracting Officer. The Government again filed a motion for dismissal.

During one of the prehearing conferences held on March 25, 1980, the Board stated that a "certification had to be an unqualified certification because, if qualified in any way, it would defeat the purpose of the certification which was to prevent overstated claims."³⁵

The Board as well as the Government was indeed puzzled that on each occasion when the Board was prepared to rule on the certification the appellant submitted a different certification by withdrawing the former certification, thus wasting the time and expense already expended by the Board and opposing counsel. Since there was at that time another certification pending before the Contracting Officer, without decision, while the last had not yet been withdrawn from the Board, the Board decided to rule upon the certification that was then before them.

The Board felt that the CDA required that a claim be made in good faith and, if quantum is in issue the exact amount had to be stated. This sum would then have to be certified if it exceeded \$50,000.

Although the legislative history of the Act was not entirely clear, the Board perceived that the purpose of the certification procedure was to prevent the assertion of inflated claims against the Government and was inserted into the statute upon the advice and recommendation of Senator Proxmire and Admiral Rickover. The Board stated their belief that Congress had intended that certification be unqualified. Additionally, the Board stated that "if every contractor

could emasculate the certification as appellant's counsel has done by adding material qualifications, the requirement for certification would be meaningless."³⁵ The certification was ruled as not satisfying the requirements of the CDA and therefore the Government's motion to dismiss the case was granted.

Interest

The incentive of interest paid on claims from the time of their receipt by the Contracting Officer to the time of payment of the claim has certainly influenced some contractors in their decision of whether to submit a claim. Cases in this section show that a number of claims were submitted requesting interest only. The contractor had no claim. In one case interest was requested on late payment by the Government.

Inland Service Corporation

This joint venture was awarded a contract on September 22, 1976, to provide refuse collection for Fort Hood, Texas. This case involved a dispute with the Government as to whether discounts in the total amount of \$12,226.43 were properly taken by the Government and with regard to the amount of interest due the appellant for any discounts improperly taken. The appellant had elected to proceed under the accelerated procedures of the Contract Disputes Act.

The contract provided for a prompt payment discount of three percent for payments made by the Government within ten calendar days from the date of completion of performance of the service or the date

a correct invoice or voucher was received, whichever was later. Payments were made on a monthly basis. Upon presentation of the voucher by letter to the Contracting Officer dated October 27, 1977, the Contractor claimed reimbursement for discounts that he claimed were improperly taken for periods dating back to October 1966, and interest on these amounts based on the CDA. The Contracting Officer issued his final decision on June 22, 1979, which denied the claim. In addition, several of the claims of the contractor were for "interest only" since the Government had reimbursed the contractor for the discounts for certain months.

The Government contended that interest on the discounts improperly taken should commence on March 1, 1979, the effective date of the Act or the date upon which the contractor elected to proceed under the Act, whichever was later. This contention was based on the theory that there was no CDA effective prior to March 1, 1979, so there could not be any interest awarded prior to that date.

The Board disagreed and ruled that the CDA clearly mandated the payment of interest on properly allowed claims processed under the Act from the date the claims were received by the Contracting Officer. The Board directed the payment of \$12,226.43 for the improper discounts taken and interest to be computed from October 31, 1977, the date of receipt of the claim.

Based on the precedent set by this decision, the Government appealed it to the Court of Claims. At the time of this writing, a final decision in the case had not been reached.

Robert Builders, Incorporated

At issue in this appeal was the contractor's claim for interest on contract modifications for changed work. The contractor and the Corps negotiated change orders for additional and revised work. Based on two contract modifications the overall price was increased by \$40,254.00 and the time of performance was extended by 26 days. The work was completed on February 27, 1979.

In a letter to the Contracting Officer, which was dated April 9, 1979, the contractor requested \$2,104.93 for interest based on these two modifications. The contractor did not claim nor did the record indicate that the Government had not made the payments in accordance with the contract terms. The Contracting Officer denied the claim by a final decision which was dated June 4, 1979, stating that there was no claim on which to base interest.

The Board agreed with the Contracting Officer's decision. In their verdict they stated that "absent the existence of some underlying claim, there is no basis for recovery of interest under Section 12 [of the CDA]. Appellant's request for interest, standing by itself, divorced from any underlying claim, cannot be regarded as a 'claim' for the purpose of Section 12."⁴⁰ The appeal was denied.

A.L.M. Contractors, Incorporated

In this case a claim in the amount of \$10,735.75 was comprised of interest sought for alleged Government delays in making progress payments and for additional time and effort exerted in seeking to expedite progress payments by numerous trips to the base procurement office.

On June 13, 1977, a contract was signed by the appellant to install new water mains and service lines at Fort Sill, Oklahoma. The initial contract price was \$147,863. On June 21, 1977, at a pre-performance conference, the appellant was informed that 10 to 14 days would elapse between the submission request for partial payments and the receipt of the payment. This delay was due to the administrative inspections and approvals which were required.

The contractor (in his claim) fixed the average time between his request for payment and his receipt of payment at 28 days. The Government record showed that the average period was 23 days. Numerous payments were made within 10 days but the last payments of October, November, and December, 1978, required between 40 and 52 days, again with slight discrepancies between the contractor's and the Government's figures.

Additionally, the contractor requested reimbursement for 31 separate trips to Fort Sill which were made in order to expedite payments on the bills. The interest charges were computed based on an interest rate of $9\frac{3}{4}$ percent ($9\frac{3}{4}\%$) for the time each payment was delayed beyond a 10-day period. The travel expenses, which totaled \$7,650, were calculated at the rate of \$200 per day for 31 days, and \$.20 per mile for 7,700 miles.

The Government argued that customary business practice allows one month for payments before interest charges can be assessed. There was no denial of the pre-performance agreement of payment within 10-14 days; however, the appellant's interest claims were based upon a limited period of 10 days. Finally, the Government contended that absent a statute or contract provision specifically authorizing this interest

recovery for Government delays in making payments, such interest was not recoverable.

The Board determined that the appellant had no basis for reliance upon the statements made by various officials at the pre-performance conference. These were meant to inform the appellant of the procedures employed and the approximate time frames for payment action. No promise could be found to support the claim of payment within 10 days or within any specified period and no generally accepted practice for payments was established.

Neither the provisions of the contract nor the terms of the Contract Disputes Act allowed the payment of interest for merely delay in making payments on the part of the Government. The appeal was denied.

Summary

The BCA set two important precedents with these decisions concerning payment of interest on claims. The first and perhaps the most significant decision to date was a liberal interpretation of the wording of the CDA which stated that interest could be awarded for time periods prior to the CDA. This ruling could potentially cost the Government millions of dollars in interest payments. The sometimes-used practice of not issuing a final Contracting Officer's decision in an attempt to wait out the contractor could be extremely costly if these non-decisions are now appealed and interest is awarded back to the date of submission of the claims. The Government and many contractors are both anxiously awaiting the Court of Claims decision on the Inland Services case.

The second precedent set was that there will be no interest awarded where there was no underlying claim. The decision, unlike the first, eliminated a number of potential cases.

Mutual Mistakes
Pavco, Incorporated

In this case, the Government argued that the Board lacked jurisdiction to consider a case of mutual mistake since the contractor had not elected to proceed under the Contract Disputes Act.

This contract involved the Government purchase of 29,800 pounds of potassium nitrate in 100-pound bags. The appellant had no previous experience in bidding for a Government contract, was not familiar with military specifications, and did not seek a copy of the specifications. The military specification was more stringent than the technical grade of potassium nitrate the appellant had planned to furnish.

On February 13, 1978, the Government solicited bids from 30 potential sources. The three responses which were received are shown below:

	<u>FOB Origin</u>	<u>FOB Destination</u>
Pavco	\$26.50/bag	-0-
Croton Chemical Co.	\$60.00/bag	\$63.00/bag
Octagon Process, Inc.	-0-	\$70.30/bag

The Government estimate, which was dated December 26, 1977, was \$30.36 per bag. However, the prior Government purchases of the technical grade of potassium nitrate were:

	<u>Date</u>	<u>No. Bags</u>	<u>Price/Bag</u>
Shape Products Co.	April 2, 1973	100	\$19.80
Shape Products Co.	April 24, 1973	130	\$19.10
Octagon Process, Inc.	Aug. 22, 1973	234	\$17.61
Octagon Process, Inc.	March 27, 1974	595	\$26.54
Croton Chemical Co.	Sept. 27, 1977	200	\$48.00
Shape Products Co.	Nov. 9, 1977	145	\$42.00
Croton Chemical Co.	Dec. 19, 1977	413	\$58.00

On March 7, 1978, the day after the bid opening, the Government's buyer telephoned the appellant's Vice-President informing him of the other bidder's prices, requesting that the appellant check his bid for a possible mistake, and advising him of the procedures for withdrawal of a bid if a mistake had been made.

The appellant's Vice-President telephoned his supplier, confirmed his price, and returned a call to the Government's buyer again confirming his price. He was then requested to do so in writing and he submitted a confirming letter dated March 8, 1978. The Government then mailed the notice of award of the contract to the appellant on April 4, 1978.

After the appellant purchased the potassium nitrate, but prior to delivery to the Government, he learned that the material he purchased did not meet the granulation or "ph" requirements of the contract. The appellant then attempted to locate a source of the technical grade potassium nitrate but was unable to do so. He did not contact his competitors. The appellant then wrote a letter to advise the Government of the appellant's mistake and inability to provide the specified grade of material. For these reasons, the appellant requested release from the contract.

On June 6, 1978, the Contracting Officer advised the appellant that the Government was considering terminating the contract for default since the appellant had failed to accomplish timely delivery. The appellant was then given ten days to respond. By letter dated June 22, 1978, the appellant informed the Government of the events as he viewed them and his inability to perform as the contract stipulated. The Contracting Officer issued a final decision on July 26, 1978, terminating the contract for default by Pavco. No appeal was filed.

The Government then reissued bids for the same material with identical contract conditions except that 600 bags (instead of the original 298) were sought. Six bids were received with prices varying from \$6.75 per bag to \$103.75 per bag. When the Government contacted the first four bidders and this time explained the specification they all requested withdrawal of their bid. The contract was finally consummated with the fifth firm at a price of \$58.00 per bag on February 6, 1979. On March 5, 1979, the Contracting Officer issued a final decision assessing an excess reprocurement cost of \$8,582.40 from Pavco.

The appellant's sole defense to this assessment of excess reprocurement cost was that they made a mistake as to the technical grade of potassium nitrate which was required by the contract and that the Contracting Officer knew, or should have known, of the mistake. The Government responded that the Board lacked jurisdiction to consider this mutual mistake defense since the appellant did not elect to proceed under provisions of the CDA.

It was a well-established fact that the Board lacked jurisdiction to consider the defense of mutual mistakes prior to the CDA. But the Board disagreed with the Government's contention concerning the appellant's election.

Both parties filed pleadings and presented testimony on the merits of the mutual mistake issues without questioning the Board's jurisdiction. The Government did not raise its jurisdictional defense until it filed its post-hearing brief. Additionally, the appellant had argued that the expanded jurisdictional issue was based on the CDA earlier in the appeal. The Board therefore denied the Government's motion to dismiss the appeal based on the question of jurisdiction.

Turning to the merits of the case, the Board found that the Government should have known of the appellant's mistake despite verbal and written bid confirmation to the contrary by the appellant. It would be unfair, pursuant to general contract principles, for the Government to take advantage of this mistake in bid when the most recent unit price and the next highest bid were 218 percent and 226 percent higher than the appellant's bid. For that reason the contract was rescinded and the assessment of the excess repurchase cost set aside.

This case alerts Contracting Officers that their bid verification must be adequate and not simply a reconfirmation of the price when a large disparity remains between the low bidder and the next higher bidder or the low bid and previous contract prices. Despite oral and written verification, this contract was rescinded by the Board due to the large price disparity.

Unilateral Mistake
Edgement Construction Company

This case involved a unilateral bid mistake by the appellant. The contract was for repair and modernization of an existing structure at Scott Air Force Base, St. Louis, Missouri. The Government awarded the construction contract to Edgement on September 26, 1978, at a price of \$169,797.50.

By letter dated November 21, 1978, the appellant advised the Government that it considered Schedule C of the contract specifications to have omitted certain items of work which were needed to complete the job. The additional work which included such items as hollow metal doors, toilet accessories, outside gutters, downspouts, and the replacement of roof sheathing totaled \$7,236.06.

On January 10, 1979, the Contracting Officer responded with the Government position that the items listed by the appellant were included in the contract specifications and/or drawings and should have been included in the appellant's bid price. The letter referenced General Provision Number 65 of the contract.

In a letter dated January 15, 1979, the appellant stated that General Provision Number 65 was only applicable to "lump sum contracts" and in view of the specificity of the items which were listed in Schedule C (e.g., wood doors, urinals) there was no logical reason for omitting items like hollow metal doors and toilet accessories. The appellant therefore requested that the Government direct him to proceed with the disputed work, with payment subject to the final resolution of the claim. On March 5, 1979, the Contracting Officer

issued his final decision denying the appellant's claim from which the appellant made a timely appeal.

The Government initially motioned to have the case dismissed contending that it was a unilateral mistake in bid over which the Board had no jurisdiction, even following the CDA. The Board disagreed by referencing Section 8(d) of the Act which authorized the Board to "grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."⁷ Contract reformation, resulting from pre-award mistake, was one such form of relief. The motion was denied.

In deciding the question of reformation of the contract, the Board referenced *Wender Presses, Inc. vs. United States*, 170 Ct. Cl. 483 which stated "a bidder who alleges error after contract award will not be accorded relief where the error was solely that of the bidder, and where the Government did not know or have reason to know that the bid was in error."²⁷ Since the appellant offered no evidence that the Government's representative knew or should have known of an error in bid he was not entitled to reformation of the contract.

As to the appellant's contention that he was entitled to recover for extra work, the Board referenced the Zisken Rule which stated: "It is a well established principle that a contractor is not entitled to additional compensation where the work in question was clearly required by the contract specifications or drawings, even though not included in any specific pay item or item in the bidding schedule."⁴²

The Board felt that the appellant's method of resolving the bid problem, by excluding the cost of these known items, was unreasonable. The admittedly unambiguous specifications and drawings put the appellant on notice that the work had to be performed. The General Provision Number 65 notified the appellant of the limited importance of the bidding schedule and its component items, as compared to the specifications and drawings. Considering these facts the appellant should have sought clarification or included the cost under one of the listed items. The appeal was therefore denied.

Chapter Summary

The intent of this chapter was to review a number of the precedent setting cases concerning the CDA. Eleven cases of the ASBCA and ENGBCA were used to further define the CDA as viewed by these Boards. These decisions will serve as the basis for future decisions by both the contractor and the Government. If their case was similar to one already decided by the Board, they will either gain an advantage in their claim negotiations or realize that they must consider the Court of Claims for their appeal.

CHAPTER V

THE LEGAL COMMUNITY'S PERCEPTION OF THE CONTRACT DISPUTES ACT AND ITS IMPLEMENTATION

This chapter deals with data which were collected by the writer as well as with the opinions and attitudes of the personnel that must operate by and under the provisions of the Contract Disputes Act. A questionnaire (which is presented in Tables 5.5 through 5.11) was prepared and distributed in an attempt to ascertain information from personnel working with the Contract Disputes Act. Copies of the questionnaire were mailed to 48 Division and District Offices of the U. S. Army Corps of Engineers and to 40 civilian contractors.

The contractors were selected from an advance notice list which contained the names of 100 general construction contractors and which was obtained from the Pittsburgh District of the Corps of Engineers by William Moore⁶ when he was doing his thesis research. Twenty contractors who had responded to Moore's questionnaire were contacted by the writer in hopes that they would also be willing to provide additional information. Twenty questionnaires were also mailed to randomly selected contractors from that same list.

Additionally, interviews were conducted with Government lawyers, Government Contracting Officers, civilian contractors, and their lawyers. These interviews and related correspondence, which are listed in Table 5.1 provided additional information concerning the views and opinions of both Government and contractor personnel concerning the Contract Disputes Act.

TABLE 5.1
DIRECT SOURCES OF INFORMATION

Name	Position	Affiliation
<u>Interviews:</u>		
David Abse	Attorney	Blinderman Construction Company
William W. Badger	District Engineer	St. Paul District
Frank Carr	Assistant Chief Attorney	O. C. E.
Michael Ferring	District Counsel	St. Paul District
Steve Forget	Contract Administration	Baltimore District
Larry B. Fulton	Contracting Officer	Omaha District
George L. Hawkes	Recorder, ASBCA	ASBCA
Randall Head	Chief Legal Counsel	O. C. E.
Gary Hudiburgh	Chief Trial Attorney	O. C. E.
Kathy Kurke	Assistant Chief Legal Counsel	O. C. E.
Ted Myers	Attorney	Memphis District
Victor Stippo	Executive	Blinderman Construction Company
Jay Wilkes	Instructor	U. S. Army Judge Advocate General School
<u>Correspondence:</u>		
Thomas R. Abretske	District Counsel	Buffalo District
M. Jody Cleaver	Assistant District Counsel	Omaha District
R. Jay Harpley	Attorney	Huntington District
Donald L. Lucas	Chief Contract Administration Branch	Louisville District

TABLE 5.1 (continued)

Name	Position	Affiliation
<u>Correspondence:</u>		
J. E. McGettigan, Jr.	District Counsel	Philadelphia District
Albert C. Proctor	District Counsel	Fort Worth District
John R. Sealzo	District Counsel	Omaha District
James L. Stuart, Jr.	Assitant District Counsel	Pittsburgh District
Charles W. Wyant	District Counsel	Chicago District

The Contract Disputes Act, a public law which changed numerous procedures in Government contracting, has also been discussed widely by the legal profession. Their perceptions, obtained from legal journals and periodicals, provided the third main source of information for this chapter. The controversial aspects of the Contract Disputes Act and the large annual dollar volume of Government contracts provided two of the main reasons for the exceptional amount of information published about the Act. This third source of information has been relied upon heavily for this as well as other chapters for three reasons:

1. The newness of the Act has resulted in limited experience in the contract world and a lack of a concentrated expertise at any one place for answering the questionnaire.

2. The personnel interviewed were people of high position which allowed limited time for questions and answers (some interviews were necessarily conducted by phone). These interviews, however, provided a more experienced viewpoint.

3. Several interviews and opinions of the most prominent legal minds were published in the current literature.

The remainder of this chapter will discuss the data gathered through the three methods of collection and the perceived impact of these CDA changes on the Corps of Engineers.

Level of Response to Questionnaire

Table 5.2 indicates the basic statistics related to the overall response rate of the questionnaire. Table 5.3 identifies the Corps'

TABLE 5.2
GENERAL RESPONSE DATA TO QUESTIONNAIRE

	Corps, Divisions, and Districts	Contracting Firms
Questionnaires Mailed	48	40
Number of Responding Agencies	39	6
Number of Agencies Providing Data	33	4

TABLE 5.3
DIVISIONS AND DISTRICTS RESPONDING TO QUESTIONNAIRES

Divisions

Lower Mississippi Valley Division
Missouri River Division
North Atlantic Division
North Central Division
Ohio River Division
Pacific Ocean Division
South Atlantic Division
South Pacific Division
Southwestern Division

Districts

Memphis District	Huntington District
St. Louis District	Louisville District
Vicksburg District	Nashville District
Kansas City District	Pittsburgh District
Omaha District	Charleston (SC) District
Baltimore District	Jacksonville District
New York District	Mobile District
Norfolk District	Savannah District
Philadelphia District	Los Angeles District
Buffalo District	Sacramento District
Chicago District	San Francisco District
Detroit District	Fort Worth District
Rock Island District	Galveston District
St. Paul District	Little Rock District
Seattle District	Tulsa District

AD-A097 095

ARMY MILITARY PERSONNEL CENTER ALEXANDRIA VA
AN ASSESSMENT OF THE IMPACT OF THE CONTRACT DISPUTES ACT OF 197--ETC(U)
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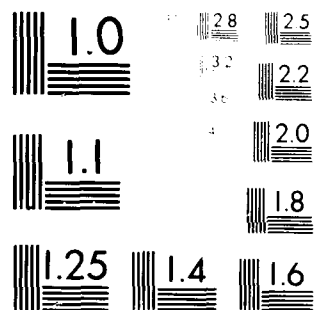
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offices that responded to the questionnaire. As noted, the response rate from the Division and District Offices of the Corps of Engineers was an excellent 81 percent (39 out of 48). However, six of those 39 responses were in the form of letters stating that they had no experience with the new Contract Disputes Act and could therefore not properly respond to the writer's request. Several of the letters did contain helpful information such as literature and other contacts that should be queried. The actual rate of questionnaires returned from the Corps of Engineers' offices which contained definite information was, therefore, 79 percent. A few questionnaires were returned with the answer "no experience" listed beside some questions. The writer did not feel, based on this type of an initial response, that follow-up questions related to these questions would provide accurate results. For this reason there was not a uniform number of responses to all questions.

The forty questionnaires mailed to the contractors had a much lower return rate than that of the Corps. Four partially completed questionnaires and two letters explaining lack of experience from which to form opinions resulted in an 11 percent return from the contractors. The author felt that there were three main reasons for this low response:

1. The relative newness of the Contract Disputes Act which only became a law on March 1, 1979.
2. The limited number of federal contracts combined with the relatively small number of claims that are carried beyond the Contracting Officer level.

3. The general reluctance of people to answer questionnaires due to other demands on their time.

These reasons which equate to a general lack of experience in most of the civilian contracting firms surveyed made the contractor data unusable. Because of this low response from the contractors only the data gathered from the Corps' questionnaires are discussed.

As a result of this unfortunate set of circumstances the "Federal Contracts Report" (FCR) published by the Bureau of National Affairs, Inc., Washington, D. C., became the main source of information related to contractor response. The August 11, 1980 issue⁶² reproduced an address by Walter F. Pettit, a prominent Washington attorney, at the ABA (American Bar Association) Public Contract Law Section Meeting in Hawaii. The subject of the address was "The Contract Dispute Act--One Year Later." Mr. Pettit's law firm surveyed 75 legal counsels representing Government contractors to obtain background information and opinions for his address. The questions asked and the answers given were not provided since the article was not written to convey specific answers or the percentages of final response to each answer. The writer felt, however, that the information gathered from these legal counselors representing Government contractors satisfactorily provided the contractor position with regard to the Contract Disputes Act. Therefore, comments from Pettit's address and other FCR articles will be combined in this chapter with the interviews conducted and the questionnaire results in order to provide a more comprehensive view of the Contract Disputes Act.

Results of the Questionnaire

The questionnaire began with an introductory paragraph which requested that responses be based on the respondent's beliefs as well as experience. This was done in an attempt to increase responses, given the newness of the Contract Disputes Act.

The 33 Corps' responses were submitted by 31 lawyers, one Contracting Officer, and one Contract Administrator. The questionnaire was designed to provide information as to the changes that have occurred or that will occur due to the passage of the Contract Disputes Act and its implementation.

The questionnaire was divided into six main areas of interest as shown in Table 5.4. The results of the questionnaire will be discussed by area with interjections of information from the other sources previously mentioned.

Time of Processing Claims

As noted in the previous chapters, the Contract Disputes Act outlines specific time limits and guidelines for resolving claims at the Contract Officer and Board of Contract Appeals level. The first four questions, listed in Table 5.5, attempted to determine if the new guidelines had in fact speeded decisions on and payments of claims.

The results related to Question 1 appear to indicate that there have been no significant changes noted in the time required to obtain decisions at the Contracting Officer or Board of Contract Appeals level. Although twice as many responses (39%) stated their belief in speedier decisions at the Contracting Officer level, only 19 percent noted speedier decisions at the Board level.

TABLE 5.4
TOPIC AREAS OF QUESTIONNAIRE

Interest Area	Question Number	Table Number
Time of Processing Claims	1, 2, 3, 4	5.5
Options for Settling Disputes	5, 6, 7	5.6
Number of Claims	8, 9, 10, 11, 12 ^a	5.7
Certification--Fraud	12, 13, 14	5.8
Government Appeals	15, 16	5.9
Overall Evaluation	17, 18, 19, 20	5.10
General Comments	21, 22, 23	5.11

^aQuestion 12 deals with two areas of interest.

TABLE 5.5
RESPONSES TO QUESTIONS CONCERNING
CLAIMS PROCESSING TIME

Question 1:	Has the Contract Disputes Act of 1978, with the provision for payment of interest on claims, affected the time taken to process a claim at the:																
	<table> <tr> <td>A) Contracting Officer Level</td><td></td></tr> <tr> <td>1) Yes, there are speedier decisions.</td><td>39% (12)^a</td></tr> <tr> <td>2) No, there is negligible change.</td><td>58% (18)</td></tr> <tr> <td>3) Yes, it has slowed the process.</td><td>3% (1)</td></tr> <tr> <td>B) Board of Contract Appeals Level</td><td></td></tr> <tr> <td>1) Yes, there are speedier decisions.</td><td>19% (6)</td></tr> <tr> <td>2) No, there is negligible change.</td><td>79% (22)</td></tr> <tr> <td>3) Yes, it has slowed the process.</td><td>0% (0)</td></tr> </table>	A) Contracting Officer Level		1) Yes, there are speedier decisions.	39% (12) ^a	2) No, there is negligible change.	58% (18)	3) Yes, it has slowed the process.	3% (1)	B) Board of Contract Appeals Level		1) Yes, there are speedier decisions.	19% (6)	2) No, there is negligible change.	79% (22)	3) Yes, it has slowed the process.	0% (0)
A) Contracting Officer Level																	
1) Yes, there are speedier decisions.	39% (12) ^a																
2) No, there is negligible change.	58% (18)																
3) Yes, it has slowed the process.	3% (1)																
B) Board of Contract Appeals Level																	
1) Yes, there are speedier decisions.	19% (6)																
2) No, there is negligible change.	79% (22)																
3) Yes, it has slowed the process.	0% (0)																
Question 2:	The Contract Disputes Act of 1978 specifically identifies expedited procedures for claims under \$50,000. Has the Act reduced the time of resolution of claims under \$50,000?																
	<table> <tr> <td>A) Yes.</td><td>69% (20)</td></tr> <tr> <td>B) No change from old disputes process.</td><td>28% (8)</td></tr> <tr> <td>C) No, it actually increased the time.</td><td>3% (1)</td></tr> </table>	A) Yes.	69% (20)	B) No change from old disputes process.	28% (8)	C) No, it actually increased the time.	3% (1)										
A) Yes.	69% (20)																
B) No change from old disputes process.	28% (8)																
C) No, it actually increased the time.	3% (1)																
Question 3:	Have the changes in the remand practice allowing the Court of Claims the option of remanding the case or retaining it and taking additional evidence reduced the ping-pong effect of cases in the appeals process?																
	<table> <tr> <td>A) Yes.</td><td>0% (0)</td></tr> <tr> <td>B) No.</td><td>0% (0)</td></tr> <tr> <td>C) Not observed.</td><td>100% (31)</td></tr> </table>	A) Yes.	0% (0)	B) No.	0% (0)	C) Not observed.	100% (31)										
A) Yes.	0% (0)																
B) No.	0% (0)																
C) Not observed.	100% (31)																

TABLE 5.5 (continued)

Question 4:	Has the change in the payment procedure to one where the Treasury Department pays all completed claims at once to later be reimbursed by the agency against which the claims was made, speeded the payment of substantiated claims?	
A) Yes.		7% (2) ^a
B) No change has been noted.		93% (26)
C) No, this procedure is slower.		0% (0)

^a() number of responses received.

The writer felt that an exact comparison of the time of processing claims at the Contracting Officer level before and after the Contract Disputes Act was complicated by the fact that the contractor had little, if any, leverage to obtain a Contracting Officer's decision on his smaller claims prior to the Contract Disputes Act. The Contracting Officer had no time restraints and no interest penalty to consider on claims prior to the Contract Disputes Act. As noted previously, some claims would become conveniently lost or delayed for a sufficient period in the hopes that the contractor would write them off as a loss. A number of cases detailed in Chapter IV showed Contracting Officer decisions being provided two years after a claim was submitted. With the uniform statutes of the Contract Disputes Act detailing the exact procedures for the processing of claims the writer feels that the contractor will receive a speedier decision on his claim.

A number of comments of the Corps personnel indicated that the 60 day requirement for a Contracting Officer's decision on claims under \$50,000 was not sufficient time to properly resolve the dispute. This time limit caused difficulties in negotiating amicable settlements as indicated by comments such as:

- Sixty days from receipt of a claim is not enough time to issue a decision which deals with complex technical or legal issues, even though the claim is under \$50,000.
- There is less cause to settle claims amicably.
- A Contracting Officer's decision is required for practically every unilateral action by the Government and most disputes with a contractor. While Congress intended amicable resolutions of disputes, the Act does not expressly provide for such procedures.

--The biggest problem is the 60-day limit for Contracting Officer decisions on claims under \$50,000.

--The interest feature encourages contractors to file claims early rather than pursuing more informal negotiations with a view toward a prompt amicable settlement.

Personalities, as mentioned previously, play an important role in all contract negotiations. A hinderance to one person is an opportunity to another as indicated by these positive comments which were received from other Corps personnel:

--The greatest benefit of the Act is the emphasis on speedy resolution of the claim. This alleviates a good amount of back-and-forth letters, hardening positions, and personal conflicts and allows presentation of a case fresh in the minds of the contractor and Government personnel.

--The time limitation for preparing Contracting Officer's final decisions demands the attention of all affected elements. This results in speedier review of the merit of the claim and enables Contract Administration personnel to maintain a better control of the claims workload.

--It forces the Government to act timely. In many cases the Contracting Officer could stall long enough to coerce a favorable settlement.

In Question 2, however, which did not deal with all claims but specifically identified claims under \$50,000, at the Board of Contract Appeal level, 69 percent indicated that the time of claim resolution was reduced. The Contract Disputes Act was written with these smaller claims in mind and identifies specific procedures (expedited for claims under \$10,000 and accelerated for claims under \$50,000) for resolution of these claims.

The factor other than these expedited and accelerated procedures that could reduce the time required to obtain decisions was the workload review conducted by the Administrator of the OFPP. This

allows the case load per judge ratio to be maintained at a uniform level throughout all the boards, thereby distributing the allocations of judicial positions by workload. This equalization of workload can only reduce the average time required to resolve disputes at the Board of Contract Appeals level.

Several Corps personnel noted that new problems have surfaced since the implementation of the CDA. The concentration of effort and attention on the small (under \$50,000) claims has lengthened the time required to resolve the larger and often more complicated claims. It cannot be determined at this time if this was only a temporary problem due to personnel learning the new procedures or if more claims were submitted under the \$50,000 limitation in order to qualify for the speedier decisions.

Question 3 showed that the respondents felt that no change in time of resolution has occurred because of the changes in the remand practices. This result was expected considering the fact that remand in a case is not a frequent occurrence. Additionally, the relatively few cases that have continued from a decision of the Board of Contract Appeals to the Court of Claims makes a different answer unlikely. The question was included because this was one of the new provisions of the Contract Disputes Act and the possibility of finding a case which was remanded necessitated the question.

The change in payment procedure by which contract claims are paid directly from funds of the U. S. Department of the Treasury was the basis for Question 4. The fact that 93 percent of the respondents had not noted a change in the time required for payment under this

procedure was expected. As a rule, it appeared that in the past payments on claims were made expeditiously with no real delay. This new procedure was enacted to resolve the problem that can occur at the end of project when the last claim submitted increased the cost of the contract beyond the amount appropriated by Congress to complete the contract. The 7 percent of responses that indicated a general decrease in the time required for payment is approximately the percentage of people who possibly have experienced delays due to the old payment procedure and see the reasoning behind the change.

Options for Settling Disputes

The Contract Disputes Act provides numerous well defined methods for the contractor or the Government to resolve their claims. Inquiries in this section were designed to determine if there was a change in procedures used for claim resolution based on these new methods. A summary of the responses is shown in Table 5.6.

As mentioned in Chapter III, contractors with claims from contracts awarded prior to March 1, 1979, had the option in their current claims to choose the disputes clause from their original contract or elect to have their claim processed under the Contract Disputes Act.

Election of the Contract Disputes Act in these claims was seen as a positive endorsement by the contractor of the new Contract Disputes Act procedures. In Question 5, 63 percent of the Corps' responses stated that the Contract Disputes Act was elected for claim resolution on contracts predating the Act.

TABLE 5.6
RESPONSES TO QUESTIONS CONCERNING
SETTLEMENT OPTIONS

Question 5:	Contracts let prior to March 1, 1979, may request a Contracting Officer's decision based on the dispute clause written into their original contract or they may elect to proceed under the provisions of the Contract Disputes Act of 1978. Which option is chosen the most?		
	A) The disputes clause in their original contract.	25%	(8) ^a
	B) Both options are chosen equally often.	12%	(4)
	C) Most elect to proceed under the Contract Disputes Act of 1978.	63%	(20)
Question 6:	Has the expanded settlement authority of the Contracting Officer and therefore, the Board of Contract Appeal to all claims concerning the contract including those outside the contract or in breach of the contract caused a shift of appeals of unfavorable Contracting Officer decisions?		
	A) More claims are taken to the Boards of Contract Appeals.	13%	(4)
	B) No real change in method of resolution.	84%	(26)
	C) More claims are taken to the Court of Claims.	3%	(1)
Question 7:	Has direct access to the court of Claims caused any shift in claims to that method of resolution?		
	A) Yes, more cases are going directly to the Court.	12%	(4)
	B) No change.	88%	(28)

^a() number of responses received.

The expanded settlement authority of the Board of Contract Appeals, to include all remedies previously available only to the Court of Claims, and the contractors direct access to the Court of Claims from a Contracting Officer's decision were two large procedural changes of the Contract Disputes Act. Despite these significant changes, Questions 6 and 7, concerning shifts of claim processing due to either of these portions of the law, drew responses of 84 percent to 88 percent stating no change was noted. This, of course, was the response based only on the Corps of Engineers experience.

The "Federal Contract Reporter," in the August 11, 1980 issue, indicated that approximately 30 cases had been appealed via the direct access route from the Contracting Officer's final decision to the Court of Claims by-passing the appropriate BCA.⁶² On these 30 claims the contractors obviously believed the added time and expense required to resolve their claim in the Court of Claims rather than at the Board level was justified. Although only this small percentage of claims were directly appealed to the court, the election of direct access was most important to those who did use it.

Number of Claims

The Contract Disputes Act and implementing regulations provided new small claims procedures that the contractor could elect when appealing a Contracting Officer's decision to the Board of Contract Appeals. The two procedures, expedited for claims under \$10,000 and accelerated for claims under \$50,000, were created by the Contract Disputes Act to provide a more timely disputes resolution method.

The Corps responses as shown in Table 5.7 indicated, based on their experience, that 13.5 percent of the claims submitted by contractors to the Board of Contract Appeals were for amounts under \$10,000. Of these claims, only 35 percent of the contractors elected to use the expedited procedure. Responses indicated 29 percent of the total claims submitted by contractors to the Board of Contract Appeals were for amounts under \$50,000 and of these claims only 41 percent of the contractors elected to use the accelerated procedure. The data received with regard to Questions 8 and 9 varied widely (as can be seen in Table 5.7 by the standard deviations which are presented along with each mean). It must also be considered that these responses represent a mix of opinions concerning the ENGBCA and ASBCA. As noted in Chapter II, Corps Civil Works contract claims are appealed to the ENGBCA while Major Construction Army (MCA) contract claims are appealed to the ASBCA.

Data from the ASBCA annual report⁵¹ was used as an indicator of changes necessitated by the Contract Disputes Act since the majority of Corps, as well as other contract claims, are appealed to that Board. The Report stated that there had been an increase in the number of appeals submitted to the Board subsequent to the Contract Disputes Act. ASBCA Chairman, Harris J. Andrews, Jr., reported that "the number of new appeals have risen from 80 to more than 100 per month . . . with cases filed under the expedited and accelerated procedure leading the way."⁵³ Mr. Andrews did attribute some of the increase in claims filed to the present economic conditions.

TABLE 5.7
RESPONSES TO QUESTIONS CONCERNING
THE NUMBER OF CLAIMS

Question 8:	Approximately what percentage of the cases going to the Board of Contract Appeals are eligible for the expedited (under \$10,000) procedure?		
	Mean	13.5%	(31) ^a
	Standard Deviation	11%	
	--for the accelerated procedure (under \$50,000)?		
	Mean	29%	(31)
	Standard Deviation	14%	
Question 9:	Approximately what percentage of the cases eligible chose the expedited procedure (under \$10,000)?		
	Mean	35%	(30)
	Standard Deviation	40%	
	--the accelerated procedure (under \$10,000)?		
	Mean	41%	(30)
	Standard Deviation	35%	
Question 10:	The expedited small claims procedure for claims of \$10,000 or less can only be elected by the contractor and decisions of the Board of Contract Appeals are final--not appealable. Has this one-chance-only approach caused:		
	A) Few appeals to be filled under this procedures, or	0%	(0)
	B) had little effect, appeals are as would be expected.	100%	(29)

TABLE 5.7 (continued)

Question 11: Has the provision for payment of interest on claims affected the actual number of claims or dollar amount of claims?

A) Dollar amounts have		
1) increased	23%	(7)
2) decreased	0%	(0)
3) no change	77%	(23)
B) Total number of claims have		
1) increased	13%	(4)
2) decreased	0%	(0)
3) no change	87%	(26)

Question 12: Disputes pursued under provisions of the Contract Disputes Act of 1978 for claims over the amount of \$50,000 require a certification that the claim is made in good faith and that supporting data are accurate and complete to the best of his knowledge and belief and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. Has this requirement:

A) reduced the claims over \$50,000, with no change in the other claims, or	3%	(1)
B) reduced the claims over \$50,000, increasing the number of claims under \$50,000, or	0%	(0)
C) not been a factor in the number of claims submitted.	97%	(31)

^a() number of responses received.

The ASBCA report states that of the 1,221 cases pending at the end of the fiscal year of 1979, 105 or approximately 9 percent, were being processed under the accelerated and expedited procedure. Although the exact number of cases processed under each procedure was not provided, the report did indicate that "the accelerated procedure is proving to be very popular with the expedited procedure less so."⁵¹ As shown by the response to Question 10 of the questionnaire, the Corps personnel did not believe that the fact that the decision of the expedited procedure was not appealable had affected the number of appeals.

Richard Solibakke, former Chairman of the ASBCA, speaking to a bar association meeting in Washington, D. C., stated his belief that ". . . 60 to 70 percent of the cases coming before the ASBCA will be eligible for the expedited or accelerated procedure."⁴⁵ His estimate made in December 1978, is significantly higher than those obtained from the Corps' survey.

The Corps' response indicated that approximately 43 percent of the cases (summing the expedited and accelerated percentages) were eligible. The writer believes that Mr. Solibakke's figures are more correct, although somewhat dated, as his remark was made in December 1978, shortly after the passage of the CDA. However, data collected through the use of a questionnaire cannot compare with the actual experience of the former head of the ASBCA.

Responses from the Corps with regard to Question 11 indicate that neither the dollar amount nor the total number of claims have increased due to the provision for the payment of interest. The

ASBCA report indicated, however, that there was an increase of 58 cases docketed in the fiscal year 1979 and an accompanying steady monthly increase.⁵¹ The exact reason for this increase, whether it was the interest provision, greater ease of the claim resolution due to the Contract Disputes Act or economic problems cannot be determined at this time. It is noteworthy that Mr. Pettit's survey of attorneys representing Government contractors⁶² listed the interest provision as the most important advantage of the Contract Disputes Act over the old disputes clause.

An overwhelming 97 percent of the Corps' responses stated that the requirement for certification of claims had not been a factor in the number of claims that were submitted. This response is difficult to accept since the two advantages of no requirement for certification on claims of \$50,000 and under and the contractor's ability to elect an accelerated procedure for resolving claims of \$50,000 and under should certainly have some effect on the contractor's decision about the amount to be claimed when the amount is near \$50,000.

Mr. Leonard J. Suchanek, Chairman of the General Services Board of Contract Appeals, stated that while the GSA BCA's case volume is up, some contractors are lowering the amounts claimed to below \$50,000.⁵³ Since this is the upper limit for election of the accelerated procedure and for claims that do not require certification neither reason can be identified as the primary one for these changes.

Certification and Fraud

The results with regard to this area are shown in Table 5.8. The Corps personnel responding to Question 13 felt that there was no change to the dollar amount or number of claims submitted due to the fraudulent claims procedure. A very large percentage (87%) of the responses stated that there was no change noted in the dollar amount of claims and 90 percent of the respondees stated there was no change in the number of claims.

This information corresponds with that of Mr. Pettit's survey of contractors' attorneys.⁶² The majority of the attorneys responding to the Pettit survey stated that they had not presented claims differently to the Government due to the required certifications or penalty provisions. Most felt that claims were not overstated to begin with, remarking that "overstatement of their claim would substantially weaken the entire claim." Additionally, several lawyers stated that "various branches of the Government have recently become far more active and aggressive in asserting and in some cases prosecuting false statements, false claims or fraud than in prior years."⁶² The combination of these reasons and the penalties stipulated by the Contract Disputes Act make it hazardous for the contractor to submit a less than totally substantiated claim.

The majority of Corps responses (90%) stated that subcontractor claims were not a significant problem prior to, or subsequent to, the Contract Disputes Act. Subcontractors lack privity with the Government. Since they have no contract with the Government, they must submit their claim in the name of the prime contractor.

TABLE 5.8
RESPONSES TO QUESTIONS CONCERNING
CERTIFICATION AND FRAUD

Question 12: See Table 5.7.

Question 13: If any part of the contractor's claim is found to be fraudulent the Contract Disputes Act makes him liable to the Government for an amount equal to that part of the claim plus the Government's cost of review. Do you feel this portion has caused a change in the:

- | | |
|-----------------------------|---------------------|
| A) Dollar amount of claims? | |
| 1) increased | 0% (0) ^a |
| 2) decreased | 13% (4) |
| 3) no change | 87% (27) |
| B) Number of claims? | |
| 1) increased | 3% (1) |
| 2) decreased | 7% (2) |
| 3) no change | 90% (27) |

Question 14: Has the Contract Disputes Act's section 5, dealing with fraudulent claims, had any effect on the submission of claims by the subcontractor since the prime contractor must certify their claims over \$50,000?

- | | |
|--|----------|
| A) This has reduced the number of claims. | 7% (2) |
| B) This had reduced the amount of these claims to below \$50,000. | 3% (1) |
| C) Subcontractor claims were never a significant problem in this area. | 90% (26) |
-

^a() number of responses received.

Prior to the CDA the subcontractor would often only require an acknowledgment from the prime contractor in order to process their claim. Subcontractors' claims for amounts over \$50,000 now require a certification from the prime contractor since he is in actuality submitting the claim because of the subcontractor's lack of privity situation.

The writer feels that this will become a significant problem for some contractors. The ASBCA fiscal year 1979 report⁵¹ indicated that only 64 of the 970 cases decided by the Board in the fiscal year 1979 related to subcontractors and only 2 percent of the total dollar amounts decided by the ASBCA involved subcontractors. With that small percentage of the overall cases being pursued by subcontractors it may be several years before a true problem will arise.

Government Appeals

The Contract Disputes Act legislatively overruled the S and E Contractors, Inc. v. United States (406 U.S. 1),²² in which the Supreme Court through its interpretation of the Wunderlich Act, precluded Government appeals of decisions of its own agency boards. The Contract Disputes Act therefore allows the Government the same appeal rights from board decisions that the contractor has always enjoyed. Questions 15 and 16 (see Table 5.9) were included in the questionnaire to solicit the impressions of the people working with the Contract Disputes Act toward this revolutionary change.

The general opinion of the Corps, as shown by the 88 percent response to Question 15 appears to be that only a limited number of BCA decisions will ever be appealed by the Government. As noted in

TABLE 5.9
RESPONSES TO QUESTIONS CONCERNING
GOVERNMENT APPEALS

Question 15: The Contract Disputes Act of 1978 provides the right of appeal of BCA decisions to both the contractor and Government under certain conditions. Do you believe that the Government would appeal a case given the requirement that appeal requests approval rests with the Attorney General?

- | | |
|---|---------------------|
| A) Yes, the Government will appeal cases. | 9% (3) ^a |
| B) Only a very limited number of cases will ever be appealed. | 88% (29) |
| C) No Government appeals will be made. | 3% (1) |

Question 16: Is it possible for the Government to move rapidly enough through all its required channels to submit an appeal within the 120 days of a Board decision as required?

- | | |
|--------------|----------|
| A) Yes. | 64% (21) |
| B) Possibly. | 27% (9) |
| C) No. | 9% (3) |
-

^a() number of responses received.

Question 16, however, only 64 percent believe that the Government can process the necessary paperwork and receive the Attorney General's approval to appeal a board decision to the Court of Claims within the 120-day requirement established by the Act.

Walter F. Pettit expressed the general consensus of opinion of those knowledgeable of CDA that the Government would only appeal important or novel issues and large monetary claims.⁴³ The Inland Services decision of the ASBCA was one such novel issue (see page of Chapter IV). In that case the Government did submit a timely appeal of the Board decision to the Court of Claims. As of this writing, no decision has been rendered in that case. The fact that one decision of a Board has already been appealed by the Government in the short period that the CDA has been law proves however that the Government is capable of meeting the time requirements and will exercise its option under the law.

Pettit also notes that if the contractor expects a Government appeal of the Board decision, he would be wise to choose the direct access route to the Court of Claims, thus eliminating the time, effort, and expense of the intermediate step of his appeal to the Board.

Overall Evaluation

The final four questions (see Table 5.10) were used to obtain the general opinions of the Corps personnel who operate under the provisions of the CDA. As noted by the response to Question 17, two-thirds of the Corps respondents believed that the CDA was a more fair and equitable method of resolving disputes than the old disputes

TABLE 5.10

RESPONSES TO QUESTIONS CONCERNING THE OVERALL OPINIONS
OF THE CONTRACT DISPUTES ACT

Question 17: In your opinion, is the Contract Disputes Act of 1978 a more equitable and fair method of resolving disputes than the previously used contract disputes clause?		
A) Yes.	67%	(22) ^a
B) No difference.	18%	(6)
C) No.	15%	(5)
Question 18: The Contract Disputes Act of 1978 appears to be written in favor of		
A) The U. S. Government.	6%	(2)
B) Neither party.	49%	(16)
C) The contractor.	45%	(15)
Question 19: Given the choice, would you prefer to operate under the old disputes clause used prior to March 1, 1979, or under the Contract Disputes Act of 1978?		
A) Old disputes clause.	27%	(9)
B) No preference.	21%	(7)
C) Contracts Dispute Act of 1978.	52%	(17)
Question 20: Which method of resolving disputes do you believe to be the least costly in terms of dollars spent for a completed contract?		
A) Old disputes clause.	39%	(12)
B) About the same case either way.	42%	(13)
C) Contracts Dispute Act of 1978.	19%	(6)

^a() number of responses received.

clause. It is interesting to note, however, as reflected by the response to Question 18 that only 6 percent of the Corps respondents believe that the CDA was written to favor the Government, while 49 percent stated it favored neither party. The remaining 45 percent believed it was written to favor the contractor. These responses appear to indicate the feeling that the disputes clauses in the old contracts favored the Government and the new CDA tends to favor the contractor. These conclusions were somewhat reinforced by Question 5 (see Table 5.6) where 63 percent of the respondents stated that the CDA was elected as a means of disputes settlement when the contractor had an option of CDA or procedures under the disputes clause of his contract.

When given the choice of which disputes procedure they would elect (see Question 19), the personnel from the Corps had a similar response to that of contractors which is shown in Question 5 with 52 percent choosing to operate under the CDA, while 27 percent elected to use the disputes clause of pre-CDA contracts. The remaining 21 percent stated that they had no preference. The writer maintains that based on the total system (uniform Board rules, exact procedures, direct access, etc.) now developed to handle claims that the CDA is the only real choice in the question of which system should be used to resolve disputes.

The Congress during discussions of the Act prior to its passage was required by the Congressional Budget Act of 1974, to state their view of the financial impact of this Act. The Legislative history shows that the Congress believed that no additional cost to

the Government would be incurred as a result of the passage of the CDA.¹³ In fact, a possible savings was predicted if the reduction of litigation, which is the theme throughout the Act, was obtained. Of the Corps respondees (see Question 20), 42 percent stated that there was no difference in their perception of the cost in terms of dollars spent for a completed contract using either disputes resolution method. Only 19 percent of the Corps respondees chose the old disputes clause as the least costly method of obtaining the desired product.

The writer perceives that as the CDA is fully implemented there will be a reduction in the cost of Government construction. The added cost of interest should be more than offset by the savings in the cost of litigation.

Resolution of a dispute is almost always less costly at the Board level than in the Court system. However, the combination of a claim processed through both the Board and the Court is the most costly of all. For this reason the contractor's ability to appeal a Contracting Officer's decision directly to the Court of Claims without the requirement of an appeal to the Board is seen as an overall cost savings on claims that would ultimately be decided in the Courts anyway. As of August 1980, 30 cases have elected the direct access option and are pending at the Court of Claims.⁶¹

General Comments

The last three questions (Questions 21, 22, and 23 shown in Table 5.11) were designed to be open ended so that experiences or perceptions of the CDA that the respondent felt were important but

TABLE 5.11
GENERAL COMMENT QUESTIONS

Question 21: What do you see as the greatest benefit of the
Contract Disputes Act of 1978?

Question 22: What do you see as the major problem with the
Contract Disputes Act of 1978?

Question 23: Additional comments.

perhaps not covered by the questionnaire could be included. Some of the significant comments submitted on these questions are listed in Appendix D.

Chapter Summary

This chapter has discussed the CDA and its effect on the resolution of Government contract claims. The three sources used for data gathered were a questionnaire completed by Corps of Engineers' personnel, interviews with Government and contractor personnel, and articles in current legal periodicals. A comparison and contrast of the opinions, attitudes, and facts gathered from the above mentioned sources has been presented.

CHAPTER VI

SUMMARY AND CONCLUSIONS

The Contract Disputes Act of 1978 has been described as the most important procurement legislation passed in the last thirty years.⁴³ It stipulates the disputes resolution process for all new Corps contracts and those of all other executive agencies. Only in contracts entered into prior to March 1, 1979, the effective date of the Act, can the old disputes clause of those contracts be used to resolve claims. Yet, even in those pre-CDA contracts, contractors can elect to proceed under the provisions of the CDA if their claims were pending final decisions by the Contracting Officer on March 1, 1979, or submitted thereafter.

President Carter expressed the feelings of many on November 1, 1978, as he signed the Act into law. He stated that "it provides for the first time a uniform statutory base for the resolution of claims and disputes arising in connection with Federal contracts. The previous process was a mass of confusing and sometimes conflicting agency regulations, judicial decisions, decisions of agency boards of contract appeals, and statutes. This Act will provide a much more logical and flexible means of resolving contract disputes. It should lead to savings for Federal agencies and their contractors."¹⁹

Summary of Findings

The Contract Disputes Act of 1978 traces its origin to the Report of the Commission on Government Procurement published in 1972. The Commission was established in 1969, and spent three years studying the Government procurement system. Their five-volume report found inequities throughout the procurement system which included the disputes resolution process. The Commission made ten specific recommendations concerning disputes resolution. Almost all of the recommendations are incorporated into the final Contract Disputes Act.

The CDA legislates a new system of claims processing. The theme of the CDA is settlement through negotiations in an attempt to limit litigation. The CDA specifies the procedures to be followed for the resolution of claims. The first major change of the CDA is the "all claims authority" of the Contracting Officer which requires that the contractor or the Government initially submit all claims to the Contracting Officer for his decision. This resolves the question of a claim covered by the contract which requires a Contracting Officer's decision and a claim that is in breach of the contract which was previously resolved through the court system.

The contractor now has two avenues of appeal from an adverse Contracting Officer's decision, in addition to being able to appeal a lack of a decision of the Contracting Officer. The contractor can appeal to the appropriate BCA as before or he now has the ability to appeal directly to the Court of Claims. The Contractor must weigh

the cost and benefits of each alternative. The same case resolved in the Courts normally takes twice as long as one resolved at the Board. The cost of processing is also twice as much as in the courts. The contractors must also consider that the decision of the Court of Claims is only appealable to the United States Supreme Court and therefore final for all intents and purposes. A decision of the Board is still appealable to the Court of Claims, thus allowing one additional appellate level. Cases that are obviously a question of law should be appealed directly to the Court of Claims to save time and money but questions of fact and cases of lower monetary amounts should be appealed to the Boards.

The CDA establishes new uniform rules for all BCA which provide small claims procedures for claims of \$50,000 or less. These procedures, which are at the sole election of the contractor, are designed to lessen the time required to resolve disputes at the Board level. This is an attempt to return Boards to an informal, expeditious, and inexpensive forum for the resolution of disputes.

The Boards are also given the expanded authority to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims. The Board has used this expanded authority to reform and rescind contracts as discussed in Chapter IV.

The most significant change of the CDA to the disputes resolution process, as stated by a survey of contractors,⁶² is the award of interest on claims which is computed from the time of submission of the claim. This change, along with the 60-day time limit on Contracting Officer's decisions involving claims under \$50,000, has

provided the leverage many contractors have felt they needed to obtain a more expeditious resolution of their claims.

This award of interest from the date of the initial submission of the claim appears to have had a detrimental effect on one of the primary goals of the CDA, namely, negotiated settlements whenever possible. The Contracting Officer generally wants to resolve the dispute before it becomes a claim because of the administrative workload involved. The contractor, on the other hand, wants the dispute accepted as a claim so that he can receive interest on the amount of the claim from the date it is accepted until the date it is paid. This conflict of intentions has reduced the possibility for amicable settlements on both sides.

The CDA also gave the Government the option to appeal decisions of the Boards to the Court of Claims, subject to the approval of the Attorney General and the same time restrictions imposed upon the contractor. As a result, the Government has already appealed the ASBCA decision of the Inland Services Corporation case to the Court of Claims. This case concerned the question of whether interest on a claim could be awarded to a date prior to the effective date of the CDA. The ASBCA, in their decision of the case, said that interest would be awarded from the submission of the claim in 1977 to the date of payment. The Government has appealed the decision to the Court of Claims where it remains at this time.

The requirement for the contractor to certify his claims if they are over \$50,000 is seen as a deterrent to the submission of fraudulent claims. The certification must state that the claim is

accurate and reflects the true amount for which the Government is liable. A corporate official of the company must sign the certification.

If a claim is found to be partially or totally fraudulent, the CDA states that the contractor must repay the amount which is determined to be fraudulent and reimburse the Government for all cost incurred by the Government in processing the claim.

Conclusions

The findings of this thesis permit a number of conclusions to be made concerning the objective of this thesis: an assessment of the impact of the CDA on U. S. Army Corps of Engineers' construction. The conclusions are necessarily qualitative and their basis can be found in the body of this paper.

Increased Workload

The theme of the Contract Disputes Act is to increase negotiated settlements, thereby reducing the disputes that must be litigated. The reduction in litigation has caused an increase in the workload of the Contracting Officer and Board of Contract Appeals. Since the CDA has been in effect, the total number of claims has increased as shown by the ASBCA's caseload. If the premise that the majority of claims are settled at the Contracting Officer level remains true, this increase in claims submitted to the Board indicates an even larger increase in claims submitted to the Contracting Officer.

The interest provision creates difficulties for the Contracting Officer. The contractor, rightfully wants his dispute accepted as a claim so that the interest provision can begin. The Contracting Officer on the other hand wants to resolve the dispute before it becomes a claim in order to save time and reduce the effort required in documentation. Additionally, the time allowed to resolve the claims has also been legislated. Claims submitted after the effective date of the CDA should be resolved within 60 days of submission in most cases.

The writer believes that the combination of these three factors--increased number of claims, initial negotiating difficulties, and time limits for resolution--will increase the amount of time the Contracting Officer or his staff must allocate to claims resolution. This increase in the workload will most likely result in an increased personnel requirement with a corresponding increase in cost. If present staff levels remain the same, it appears that this will cause a reduction in another area of the administration of the contract.

Level of Emphasis

The CDA has increased the emphasis placed on claims for amounts under \$50,000 at both the Contracting Officer level and the Board level. New time limitations and special provisions for the resolution of these smaller claims have been introduced. There was concern by some Corps respondees that this special attention would divert efforts from the settlement of larger claims. The writer believes it will. It was designed for that purpose. But the large claims will still be

given the proper attention for the same reason that they were given attention before the CDA. They deal with large amounts of money and can be critical to the successful completion of any project.

Timely Resolution

One positive aspect of the interest provisions and the time requirements is that these factors may provide the impetus needed for some Contracting Officers to provide a timely resolution of claims. Better control of the claims workload can be maintained if a claim is resolved the first time it is reviewed and researched. A speedy decision will delete requirements for a second review at a later time. This savings of time and effort could offset the extra workload due to the increased number of claims. There was, however, no data collected in this research to justify that observation.

Interest

The topic of interest, already shown to be the most favorable portion of the new Act by the survey of contractors, will cause changes in the Corps' construction. Interest on pre-CDA contracts with claims submitted prior to March 1, 1979, but not yet resolved will be costly if the Inland Services decision is upheld and interest is due on those old claims. The addition of the interest itself will increase the cost of construction. The Corps, as a Governmental agency, must contract their construction with monies allocated by Congress, often with specific amounts identified for each contract. The interest provision for "old" claims will directly decrease the amount of money available for the construction. The savings expected

by the Act, if any, will be the result of a reduction in the cost of litigation which is part of an overhead or operating budget of the Corps. This savings in the cost of litigation may reduce the total overall cost to the Government but the Corps' cost of construction will only show the increase due to the cost of interest.

Improvements

Perhaps the most obvious conclusion of the impact of the Contract Disputes Act on the Corps as well as other Government construction can be drawn from a comparison of the methods of resolution of claims before and after the implementation of the CDA as shown in Figures 2.2 and 3.1. The CDA has provided a flexible system of claims resolution structured for the majority of claims with enough freedom of choice that special or unusual claims can also be resolved easily. Methods for resolving disputes such as those provided by the CDA can only lead to improved relations between contracting parties and ultimately a better final product.

Certification of Claims

The general lack of importance placed on the requirement for certification on claims exceeding \$50,000 was an unexpected result of this research. The Corps respondents overwhelmingly indicated that this was not a factor in claim submission. This was also echoed in the survey of the contractors. Apparently, this is not a new subject to the contractors performing Government construction as a number indicated that the previous legislation such as the Department of Defense Authorization Act and the False Claims Act have also required

certifications and have fraud provisions similar to the CDA. The CDA appears to be the late entry in the Government's attempt at the prevention of fraud.

Education Requirement

The final conclusion drawn from this research is that there is a requirement to educate the personnel working with this Act. Contracting Officers, for the most part, could only answer the most preliminary questions about the Act. Only one of the 33 questionnaire responses from the Corps was that of a Contracting Officer. The CDA has given the Contracting Officer more authority but there doesn't seem to be a corresponding increase in knowledge of his duties. The Contracting Officer cannot bear the total brunt of this criticism as the entire system places a reliance on a judicial entity to provide guidance as to the meaning of the Act. This dependence seems to produce a number of uncertainties and confusion on the part of the personnel implementing the Act. Certainly, the lack of legislative history on some portions of the Act has contributed to the many questions concerning the Act and has delayed its total implementation.

Areas for Future Research

This research study has been conducted to assess the impact of the Contract Disputes Act on the construction contracts of the Corps of Engineers. As indicated, the Contract Disputes Act is relatively new and continued research of this topic is certainly warranted. A more complete assessment can be made when the Boards of

Contract Appeals expands its rulings to all the portions of the CDA and the Court system begins to return their decisions on appeals of the Act.

During this study a number of additional areas were identified which should be the subject for future research efforts. These include:

1. A review of the adequacy of the Wunderlich Act's "substantial evidence" test as criteria for appeals of Board of Contract Appeal's decisions to the Court of Claims.
2. An investigation of the Board of Contract Appeal's system which compares and contrasts the Boards, their decisions, and their relationship to the agencies they serve. This could include research into the current idea of consolidation of all the BCA's into one Board.
3. An analysis of the CDA as viewed by the members of the various Boards of Contract Appeals.
4. A comparison of the effect of the CDA on construction in various Government agencies. Several projects, each constructed by a different agency, could be monitored and the methods of resolving disputes could be compared.
5. An analysis of the duties of a Contracting Officer as changed by the CDA.

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APPENDIX A

THE CONTRACT DISPUTES ACT OF 1978

PUBLIC LAW 95-563—NOV. 1, 1978

92 STAT. 2383

Public Law 95-563
95th Congress

An Act

To provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies.

Nov. 1, 1978
[H.R. 11002]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Contract Disputes Act of 1978".

Contract Disputes
Act of 1978.
41 USC 601 note.

DEFINITIONS

SEC. 2. As used in this Act—

41 USC 601.

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, United States Code, an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office); a military department as defined by section 102 of title 5, United States Code, and a wholly owned Government corporation as defined by section 846 of title 31, United States Code, the United States Postal Service, and the Postal Rate Commission;

(3) The term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) The term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act;

(6) The term "agency board" means an agency board of contract appeals established under section 8 of this Act; and

(7) The term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

APPLICABILITY OF LAW

SEC. 3. (a) Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28, United States Code) entered into by an executive agency for—

41 USC 602.

(1) the procurement of property, other than real property in being;

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- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

Tennessee Valley
Authority
contracts.

(b) With respect to contracts of the Tennessee Valley Authority, the provisions of this Act shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this Act, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the Act.

(c) This Act does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the Act to the contract would not be in the public interest.

MARITIME CONTRACTS

41 USC 603.

SEC. 4. Appeals under paragraph (g) of section 8 and suits under section 10, arising out of maritime contracts, shall be governed by the Act of March 9, 1920, as amended (41 Stat. 525, as amended: 46 U.S.C. 741-752) or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended: 46 U.S.C. 781-790) as applicable, to the extent that those Acts are not inconsistent with this Act.

FRAUDULENT CLAIMS

41 USC 604.

SEC. 5. If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

DECISION BY THE CONTRACTING OFFICER

Contractor
claims.
41 USC 605.

Information to
contractor.

SEC. 6. (a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as

authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) (1) A contracting officer shall issue a decision on any submitted claim of \$50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

Certification.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over \$50,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

Notification.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

CONTRACTOR'S RIGHT OF APPEAL TO BOARD OF CONTRACT APPEALS

SEC. 7. Within ninety days from the date of receipt of a contracting officer's decision under section 6, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 8.

41 USC 606.

AGENCY BOARDS OF CONTRACT APPEALS

SEC. 8. (a) (1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

Establishment.
consultation.
41 USC 607.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

Membership.

(b) (1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as

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- hearing examiners appointed pursuant to section 3105 of title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.
- 5 USC 5332 note.
- Appointment
criteria and
chairman.
Compensation.
- (2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2), and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332, United States Code for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.
- Appeals,
arrangements.
- (c) If the volume of contract claims is not sufficient to justify an agency board under subsection (a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.
- Jurisdiction.
- (d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims.
- (e) An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.
- Appeal
disposition
acceleration.
- (f) The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) (1) The decision of an agency board of contract appeals shall be final, except that— Judicial review.

(A) a contractor may appeal such a decision to the Court of Claims within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the United States Court of Claims for judicial review, under section 2510 of title 28, United States Code, as amended herein, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code, within one hundred twenty days after the date of the decision in any case.

(h) Pursuant to the authority conferred under the Office of Federal Procurement Policy Act, the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this Act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority). Guidelines.
41 USC. 401
note.

(i) Within one hundred and twenty days from the date of enactment of this Act, all agency boards, except that of the Tennessee Valley Authority, of three or more full time members shall develop workload studies for approval by the agency head as specified in section 8(a)(1). Workload
studies.

SMALL CLAIMS

SEC. 9. (a) The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor. Procedure rules,
provisions.
41 USC 608.

(b) The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this Act.

(f) The Administrator is authorized to review at least every three years, beginning with the third year after the enactment of the Act, Review

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the dollar amount defined in section 9(a) as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

ACTIONS IN COURT: JUDICIAL REVIEW OF BOARD DECISIONS

41 USC 609.

SEC. 10. (a) (1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 6 to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, United States Code, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 8, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 8, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper, or, in its discretion and in lieu of remand it may retain the case and take such additional evidence or action as may be necessary for final disposition of the case.

(d) If two or more suits arising from one contract are filed in the Court of Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the Court of Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) In any suit filed pursuant to this Act involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

SUBPENA, DISCOVERY, AND DEPOSITION

41 USC 610.

SEC. 11. A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board.

In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

INTEREST

Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. 41 USC 611.

APPROPRIATIONS

Sec. 13. (a) Any judgment against the United States on a claim under this Act shall be paid promptly in accordance with the procedures provided by section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a). 41 USC 612.

(b) Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) above.

(c) Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a) by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) (1) Notwithstanding the provisions of subsection (a) through (c), any judgment against the Tennessee Valley Authority on a claim under this Act shall be paid promptly in accordance with the provisions of section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831(h)).

16 USC 831h.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831(h)).

AMENDMENTS AND REPEALS

Sec. 14. (a) The first sentence of section 1346(a)(2) of title 28, United States Code, is amended by inserting before the period a comma and the following: "except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978".

Ante, p. 2383.

(b) Section 2401(a) of title 28, United States Code, is amended by striking out "Every" at the beginning and inserting in lieu thereof "Except as provided by the Contract Disputes Act of 1978, every".

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(c) Section 1302 of the Act of July 27, 1956, as amended (70 Stat. 694, as amended; 31 U.S.C. 724a), is amended by adding after "2677 of title 28" the words "and decisions of boards of contract appeals".

(d) Section 2414 of title 28, United States Code, is amended by striking out "Payment" at the beginning and inserting in lieu thereof "Except as provided by the Contract Disputes Act of 1978, payment".

(e) Section 2517(a) of title 28, United States Code, is amended by striking out "Every" at the beginning and inserting in lieu thereof "Except as provided by the Contract Disputes Act of 1978, every".

(f) Section 2517(b) of title 28, United States Code, is amended by inserting after "case or controversy" the following: ", unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.".

(g) There shall be added to subsection (c) of section 5108 of title 5, United States Code, a paragraph (17) reading as follows:

"(17) the heads of executive departments or agencies in which boards of contract appeals are established pursuant to the Contract Disputes Act of 1978, and subject to the standards and procedures prescribed by this chapter, but without regard to subsection (d) of this section, may place additional positions, not to exceed seventy in number, in GS-16, GS-17, and GS-18 for the independent quasi-judicial determination of contract disputes, with the allocation of such positions among such executive departments and agencies determined by the Administrator for Federal Procurement Policy on the basis of relative case load."

5 USC 5332
note.

Cases, referral.

(h) (1) Section 2510 of title 28, United States Code, is amended by—

(A) inserting "(a)" immediately before such section; and

(B) adding the following new subsection at the end thereof:

"(b) (1) The head of any executive department or agency may, with the prior approval of the Attorney General, refer to the Court of Claims for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which such head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contracts Disputes Act of 1978. The head of each executive department or agency shall make any referral under this section within one hundred and twenty days of the receipt of a copy of the final appeal decision.

"(2) The Court of Claims shall review the matter referred in accordance with the standards specified in section 10(b) of the Contracts Disputes Act of 1978. The Court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, as appropriate, render judgment thereon, take additional evidence, or remand the matter pursuant to the authority specified in section 1491 of this title."

28 USC 1491.

(2) (A) The section heading of such section is amended to read as follows:

"§ 2510. Referral of cases by the Comptroller General or the head of an executive department or agency."

(B) The item relating to section 2510 in the table of sections for chapter 165 of title 28, United States Code, is amended to read as follows:

"2510. Referral of cases by the Comptroller General or the head of an executive department or agency."

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(i) Section 1491 of title 28, United States Code, is amended by adding the following sentence at the end of the first paragraph thereof: "The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978." Jurisdiction.

SEVERABILITY CLAUSE

SEC. 15. If any provision of this Act, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. 41 USC 613.

EFFECTIVE DATE OF ACT

SEC. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter. 41 USC 601 note.

Approved November 1, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1556 (Comm. on the Judiciary).

SENATE REPORT No. 95-1118, accompanying S. 3178 (Comm. on Governmental Affairs and Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 124 (1978):

Sept. 26, considered and passed House.

Oct. 12, considered and passed Senate, amended.

Oct. 13, House concurred in Senate amendments.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 14, No. 44:

Nov. 1, Presidential Statement.

APPENDIX B

DEFINITION OF TERMS

DEFINITION OF TERMS

The legal profession has many terms that do not always have universally accepted definitions. The U. S. Army Corps of Engineers also uses terminology often unfamiliar to personnel not accustomed to working with the Corps. These definitions are provided for the reader so that the true context of the thesis can be better understood.

Agency Head: The head or any assistant head of an executive agency, and may upon designation by the head of an executive agency include the chief official of any principal division of the agency.

ASBCA: Armed Services Board of Contract Appeals.

Executive Agency: An executive department as defined in Section 101 of Title 5, United States Code, an independent establishment as defined in Section 104 of such Title, a military department as defined in Section 102 of such Title, or a wholly owned Government corporation, such as the United States Postal Service, and the Postal Rate Commission.

Contracting Officer: A Government officer or employee authorized to execute a contract on behalf of the Government or any other Government officer or employee who is a properly designated contracting officer.

Contractor: A party to a Government contract other than the Government.

Administrator: Administrator for the Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act.

Cardinal Change: In federal procurement, a change of such magnitude that the scope of the work appears substantially different from that originally contemplated. This can also occur through an excessive number of changes rather than one large change.

Claim: A written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or relating to the contract.

Voucher: An invoice, or other routine request for payment that is not in dispute when submitted and is not a claim for the purposes of the Act.

Certiorari: An appellate proceeding for reexamination of action of an inferior tribunal, a writ of superior court to call up the records of an inferior court or body acting in a quasi-judicial capacity.

Discovery: The disclosure by the defendant of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a cause or action pending or to be brought in court.

Declaratory: Explanatory, designed to fix or elucidate what before was uncertain or doubtful.

Deposition: A statement made orally by a person under oath before an examiner, commissioner, or officer of the court (but not in open court) which is transcribed and duly authenticated and intended to be used upon the trial of an action in court.

De Novo: A new trial.

ENGBCA: U. S. Army Corps of Engineers Board of Contract Appeals.

Injunction: A court order enjoining or prohibiting a party from a specific course of action.

Quantum: The dollar amount of a claim.

Substantial Evidence: In dealing with an administrative finding, the court examines the evidence to determine whether there is sufficient evidence from which a reasonable man might have reached the conclusion under review; it cannot set aside the finding or verdict merely because it would have reached a different result itself.

Remand: To send back. The sending back of a case to the same court (or board) out of which it came, with instructions about further proceedings.

APPENDIX C

THE DEFENSE ACQUISITION REGULATIONS' DISPUTES CLAUSES

AS CHANGED BY THE CONTRACT DISPUTES ACT

7-103.12 DISPUTES CLAUSE¹⁶

(a) The following clause shall be included in all contracts subject to the Contract Disputes Act unless exempted by the Secretary pursuant to 41 U.S.C. 602(c).

Disputes (1980 Jun)

(a) This contract is subject to the Contract Disputes Act of 1978 (P.L. 95-563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c) (i) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. However, a written demand by the contractor seeking the payment of money in excess of \$50,000 is not a claim until certified in accordance with (d) below.

(ii) A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim pursuant to the Act by complying with the submission and certification requirements of this clause.

(iii) A claim by the contractor shall be made in writing and submitted to the contracting officer for decision. A claim by the Government against the contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than \$50,000, the contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. The certification shall be executed by the contractor if an individual. When the contractor is not an individual, the certification shall be executed by a senior company official in charge at the contractor's plant or location involved, or by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(e) For contractor claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the contractor, render a decision within 60 days of the request. For contractor certified claims in excess of \$50,000 the Contracting Officer must decide the claim within 60 days or notify the contractor of the date when the decision will be made.

(f) The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

(g) Interest on the amount found due on a contractor claim shall be paid from the date the contracting officer receives the claim, or from the date payment otherwise would be due, if such date is later, until the date of payment.

(h) The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action arising under the contract, and comply with any decision of the Contracting Officer.

(b) The following subparagraph shall be substituted for subparagraph (h) of (a) above as required under the circumstances described in 1-314(k) (ii).

(h) The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action arising under or related to the contract, and comply with any decision of the Contracting Officer. (1980 Jun)

1-314 DISPUTES AND APPEALS

(a) General. The Contract Disputes Act of 1978 (P.L. 95-563, 41 U.S.C. 601-613) establishes procedures and requirements for asserting and resolving claims by or against contractors relating to a contract subject to the Act. In addition, the Act provides for the payment of interest on contractor claims, for the certification of contract claims in excess of \$50,000, and a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

(b) Definition of Claim.

(i) As used herein "claim" means a written demand by one of the contracting parties seeking, as a matter of right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract. However, a written demand by the contractor seeking the payment of money in excess of \$50,000 is not a claim unless or until certified as required by (1).

(ii) A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim under Section 6(a) of the Act as provided in (h) below.

(c) Government Policy on Settlement by Mutual Agreement. It is the Government's policy, consistent with the Act, to try to resolve all contractual issues by mutual agreement at the contracting officer's level, without litigation. Implementation of this policy depends on an open mind with regard to such issues and the adequacy of the supporting information provided by both the contractor and the Government. In appropriate circumstances, before issuance of a contracting officer's decision on a claim, informal discussions between the parties, to the extent feasible, by individuals who have not participated substantially in the matter in dispute, can aid in the resolution of differences by mutual agreement and should be considered.

(d) Contracting Officer Authority. Except as provided in this subparagraph (d), the Contracting Officer is authorized (within any specific limitations in his warrant) to decide or settle all claims relating to a contract subject to the Act. The authority of this subparagraph (d) does not extend to (1) a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine, or (2) any claim involving fraud. See subparagraph (g) below.

(e) Contracts Excepted from the Act. A contract with a foreign government or agency thereof, or with an international organization or subsidiary body thereof may be exempted from the Act and DAR 1-314 if the Secretary determines that application of the Contract Disputes Act to the contract would not be in the public interest.

(f) Mistakes under the Contract Disputes Act.

(i) Requests for relief under Public Law 85-804 are not considered to be claims within the Contract Disputes Act of 1978 or the Disputes Clause, and shall continue to be processed under DAR Section XVII. However, certain kinds of relief formerly available only under Public Law 85-804, i.e., legal entitlement to rescission or reformation for mutual mistake, are now available within the authority of the Contracting Officer under the Act and the Disputes Clause. In case of a question whether the Contracting Officer has authority to settle or decide specific types of claims, the Contracting Officer should seek legal advice.

(ii) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the

Contract Disputes Act of 1978 (41 U.S.C. §601 et seq.). A contract may be reformed or rescinded by the Contracting Officer if the contractor would be entitled to such remedy or relief under the law of federal contracts. Due to the complex legal issues likely to be associated with any such allegations of legal entitlement, Contracting Officers shall make written decisions either granting or denying relief in whole or in part, which decisions shall be prepared with the advice and assistance of legal counsel.

(iii) A claim that is either denied, or not approved in its entirety, under (ii) above may be cognizable as a request for relief under P.L. 85-804 and Section XVII of the DAR. However, such claims must first be submitted to the Contracting Officer for consideration under (ii) above since such claims are not cognizable under P.L. 85-804 and DAR Section XVII unless other legal authority in the Department concerned is determined to be lacking or inadequate.

(g) Referral of Suspected Fraudulent Claims. If a contractor is unable to support any part of its claim and there is evidence that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, the Contracting Officer shall refer the matter to the designated department or official responsible for investigating fraud, as listed in 1-600(b).

(h) Initiation of a Claim. Contractor claims shall be made in writing and submitted to the Contracting Officer for a decision. Claims by the Government against a contractor shall be the subject of a Contracting Officer decision.

(i) Contracting Officer's Decision.

(i) When a claim by or against a contractor cannot be satisfied or settled by agreement and a decision on the claim is necessary, the Contracting Officer shall:

- (A) review the facts pertinent to the claim;
- (B) secure assistance from legal and other advisors; and
- (C) coordinate with the contract administration office or contracting office, when appropriate.

(ii) The Contracting Officer shall furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and shall include in the decision:

- (A) a paragraph substantially as follows:

This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Contract Appeals.

If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the Board of Contract Appeals within ninety days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, shall reference this decision, and identify the contract by number. For appeals under this clause you may, solely at your election, proceed under the Board of Contract Appeals small claims procedure for claims \$10,000 or less or their accelerated procedure for claims \$50,000 or less. In lieu of appealing to the cognizant Board of Contract Appeals you may bring an action directly to the U.S. Court of Claims,* within twelve months of the date you receive this decision.

*[Except as provided in Section 4 of the Act
(Maritime Contracts)]

- (B) a description of the claim or dispute;
- (C) a reference to pertinent contract provisions;
- (D) a statement of the factual areas of agreement or disagreement; and
- (E) a statement of the Contracting Officer's decision, with supporting rationale.

(iii) The Contracting Officer shall issue the decision within the following statutory time limitation:

- (A) For claims not exceeding \$50,000: If requested by the contractor sixty days after receipt of the written request. If no contractor request is received by the Contracting Officer, the decision shall be rendered in a reasonable time.
- (B) For claims exceeding \$50,000: Sixty days after receipt of a certified claim; provided, however, if a decision is not issued within sixty days the Contracting Officer shall notify the contractor of the time within which he will make the decision.
- (C) The reasonableness of these time periods will depend on the size and complexity of the claims and the adequacy of the contractor's supporting data and any other relevant factors.

(iv) The amount determined payable pursuant to the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

(j) Payment of Interest on Contractor's Claims. The Government shall pay interest on a contractor claim on the amount found due and unpaid, from the date the Contracting Officer receives the claim (properly certified, if required, in accordance with [1]), or from the date payment otherwise would be due, if such date is later, until the date payment is made, at the rate or rates fixed by the Secretary of the Treasury pursuant to the Renegotiation Act, Public Law 92-41.

(k) Disputes Clause.

(i) The Act applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCA) created under the Act have the same powers of relief as the Court of Claims with respect to a claim that is subject to the Act. Thus, the statutory agency BCAs continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The Disputes Clause set forth in 7-103.12 recognizes the all disputes authority established by the Act, and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. It is not intended to affect the rights and obligations of the parties as provided by the Act, nor to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals pursuant to the Act.

(ii) In general, prior to passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, Section 6(b) of the Act authorizes contracting agencies to include a provision requiring a contractor to continue performance of a contract in accordance with the contracting officer's decision pending final decision on a claim relating to the contract. In unusual circumstances, the performance of some contracts may be so vital to the national security or to the public health and welfare that performance must be guaranteed even in the event of a dispute which may be characterized as a claim relating to, as opposed to arising under, the contract. In recognition of this fact, an alternate provision is provided for subparagraph (h) of the Disputes Clause at 7-103.12(b).

The acquisitions of aircraft, naval vessels, missiles, tracked combat vehicles and related electronic systems shall include the alternate provision at 7-103.12(b). In addition the alternate provision at 7-103.12(b) may also be used in those

contracts or classes of contracts where it has been determined in accordance with Departmental procedures, that it is essential because of the unusual circumstances described in this subparagraph (ii). The determination to use the alternate provision at 7-103.12(b) in other situations shall be made by the Head of the Contracting Activity responsible for the acquisition involved. Examples of the types of unusual circumstance where continued performance may be determined to be vital to the national security or public health and welfare include the acquisition of weapons, support systems and related components other than those listed above, or other essential supplies or services whose timely reprocurement from other sources would be impracticable. In all contracts employing the alternate provisions at 7-103.12(b), agencies should in the event of a dispute not arising under but relating to the contract consider providing, through appropriate departmental procedures, financing of the continued performance, provided that the Government's interests are properly secured.

(1) Certification of Contractor Claims Over \$50,000.

(i) Section 6(c)(1) of the Act requires that a contractor claim over \$50,000 shall be certified at the time of submission that it is made in good faith; that the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(ii) The certification shall be executed by the contractor if an individual. When the contractor is not an individual, the certification shall be executed by a senior company official in charge at the contractor's plant or location involved, or by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(iii) In determining when the dollar thresholds requiring claim certification are met the aggregate amount of both the increased and decreased costs shall be used. (See examples at 3-807.3(b)(ii)).

APPENDIX D

REPRESENTATIVE WRITTEN COMMENTS

REPRESENTATIVE WRITTEN COMMENTS

This Appendix contains comments extracted from Questions 21, 22, and 23 of the questionnaire. These three questions allowed respondents an opportunity to qualify or elaborate on answers given to Questions 1 through 20 and to provide additional comments on the Contract Disputes Act of 1978. These open-ended questions also provided an opportunity for respondents to interject information on subject areas deemed important but not covered in the questionnaire.

Comments represent the majority of subject areas covered by respondents' comments with duplications not included.

Question 21. What do you see as the greatest benefit of the Contract Disputes Act of 1978?

Comments:

The expanded authority of the Contracting Officer removes old problem of issues of fact vs. issues of law, and results in most efficient processing of all types of claims.

The increase in scope of types of disputes which can be resolved by the Contracting Officers and the BCA's.

Broader power in Contracting Officer to grant appropriate relief.

Eliminated the unworkable distinction of disputes under the contract and breach, along with expanding powers of Contracting Officers and Boards to adjust such claims.

Expanded discovery. "All disputes" right of Government appeal.

The right of government appeal. Contractor's responsibility to certify claims.

Different options open to Contractor and ability to resolve all disputes, equitable, legal, and "under the contract."

From the contractor's point of view, it provides a basis for interest payment and an expanded period of time to appeal. From the Government's point of view, it provides limited appeal rights.

Should expedite issuance of Contracting Officer's decisions and ultimate Board decisions, particularly on smaller claims.

Question 22. What do you see as the major problem with the Contract Disputes Act of 1978?

Comments:

The greatest problem stems from the imprecise manner in which it was written. Once the flurry of cases have defined the problem areas, resolution of disputes should be fairly smooth.

Because of its relative newness there is a lack of certainty regarding various provisions which must await BCA/Court of Claims decisions, e.g., interest, certification, etc.

Poor general draftsmanship.

Definition of claim--when does interest start to run?

Question 22 continued (comments)

Interpretation of language, i.e., interest provisions, etc.

As with any new legislation, the uncertainty of implementing the Act without the benefit of interpretations by the Courts and Boards of Contract Appeals.

Contracting Officer decisions based on less than optimum information.

Too many cases Government wide under accelerated and/or expedited procedure has greatly increased time for Boards to act on regular appeals.

Contractors have the procedural advantage, e.g., expedited claims.

Interest on old contract claims.

In the accelerated procedure, there isn't adequate time for parties to write good briefs because the Board leaves itself adequate time for it to decide the case.

The cost of settlement will be increased due to the interest provision and the bureaucratic nightmare an agency held office must go through to acquire funds.

Penalty for false certification or lack of means to enforce.

The election by the contractor to go directly to the Court of Claims within one year from the date of the final decision places the Government in the position of not being able to fiscally close out contracts. This part of the Act is detrimental to effective contract administration.

Government may have to wait for a full year before being certain that no suit will be filed.

Keeping within time limitations for expedited appeals.

Meeting the 60-day time limit for issuing a decision. Who will determine and what evidence is necessary for finding of fraud in a contractor's claim.

The major problem with the Act is a growing tendency by contractors to abuse it. For example, on change orders the contractor will submit an unreasonable proposal, the government will reject it and immediately the contractor says, "give me a Contracting Officer's decision. I have a claim," with an eye toward the interest provision.

Question 23. Additional comments.

Comments:

Contract Disputes Act is a major step in the upgrading of the "state of the art" of the evaluation and processing of claims and appeals.

Provision on "interest" in the Act should be clarified as to when it is applicable. As with any new Act, experience and many Board and Court decisions will be required to determine uniform applicability to certain contractual situations. The Act is not clear as to whether it applies to relocation contracts which are essentially the acquisition of an "interest" in real estate.

The time limits given for the Contracting Officer's decision, as well as for the Boards under expedited and accelerated procedures, are too short to be realistic. I believe these time limits may result in adverse decisions to the contractors in certain cases due to insufficient time for complete investigation negotiation.

I feel agency attorneys should fully represent agency in all litigation in Federal Courts.

The increased jurisdiction of the Boards to consider breach, implied contracts, reformation, rescission, etc., simplifies the location of a proper forum for these remedies.

We have had few formal claims as yet--contractors don't want formality of CDA unless "claim" can't be resolved at field level.

We have insufficient experience with the law to answer many of the questions.

The above comments are based on a very limited time frame. It will be at least two years before we can assess the real impact of the Act.

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